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IN THE

# Supreme Court of the United States

GERALD WILLIAM CARDINAL,

*Petitioner*,

v.

LINDA METRISH,

*Respondent.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5, provides an express private right of action to "obtain appropriate relief against a government," *id.* § 2000cc-2. Exacerbating a circuit split, the Sixth Circuit held that the Eleventh Amendment precludes awards of compensatory damages under this provision against states and state officials in their official capacities. The question presented is:

Whether states and state officials in their official capacities may be subject to suit for damages for violations of the Religious Land Use and Institutionalized Persons Act?

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Gerald William Cardinal respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 564 F.3d 794. The district court's opinion (Pet. App. 19a-27a) is unpublished.

## JURISDICTION

The judgment of the court of appeals was entered on April 24, 2009. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

### I. Constitutional Provisions

The Eleventh Amendment to the United States Constitution, U.S. CONST. amend. XI, provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

### II. Statutory Provisions

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5 (2000), provides, in relevant part:

**Section 2000cc-1. Protection of religious exercise of institutionalized persons**

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which—

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

**Section 2000cc-2. Judicial relief**

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial

proceeding and obtain appropriate relief against a government.

* * * * *

**Section 2000cc-5. Definitions**

In this chapter:

* * * * *

(4) Government

The term "government"—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law . . . .

* * * * *

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

## STATEMENT OF THE CASE

Petitioner, a prison inmate, brought this suit against Warden Linda Metrish in her official capacity, seeking monetary damages for violations of his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5 (2000). In acknowledged conflict with the Eleventh Circuit, the Sixth Circuit held that although RLUIPA's statutory text supported damages claims against states and state officials in their official capacities, the Eleventh Amendment foreclosed such relief.

1. RLUIPA is a civil rights law designed to protect against religious discrimination, unequal religious accommodations, and unjustified infringement of the free exercise of religion. Section 3 of the Act applies to any state prison that "receives Federal financial assistance," *id.* § 2000cc-1(b), and directs that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," *id.* § 2000cc-1(a), unless the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means" of furthering that interest, *id.* §§ 2000cc-1(a)(1) and (2). "[R]eligious exercise" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A).

Congress enacted RLUIPA's institutionalized persons provision in response to substantial evidence, collected during three years of hearings, indicating that persons institutionalized in state facilities face "'frivolous or arbitrary' barriers" to their religious

exercise. *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005) (citation omitted); *see also* H.R. Rep. No. 106-219, at 9-10 (1999) (describing one prison's taping of confession between priest and penitent, and another prison's refusal to provide Jewish prisoners with unleavened bread during Passover, "essentially forcing all Jewish inmates to violate their sacred religious practices"); *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. S7774-75 (daily ed. July 27, 2000) (summarizing findings); *Protecting Religious Liberty After Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 1st Sess., Pt. 3, at 41 (1998) (*Joint Stmn.*) (discussing discriminatory accommodations).

Based on its investigation, Congress found that, "[w]hether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." *Joint Stmn.*, 146 Cong. Rec. at S7775. Concerned that federal funding not contribute to such frivolous, unreasoned, or discriminatory impositions on religious exercise, Congress invoked its Spending Clause authority, U.S. CONST., art. I, § 8, cl. 1, to require the application of RLUIPA's heightened statutory protection for religious exercise whenever a substantial burden on religious exercise "is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. § 2000cc-1(b)(1).

To ensure effective enforcement of the Act, Congress created an express private right of action, providing that a "person may assert a violation of this

chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a). The term "government," in turn, is broadly defined to include:

> (i) a State, county, municipality, or other governmental entity created under the authority of a State;
>
> (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and
>
> (iii) any other person acting under color of State law . . . .

*Id.* § 2000cc-5(4)(A).

2. Petitioner was an inmate at Hiawatha Correctional Facility of the Michigan Department of Corrections (MDOC) at the time of the events at issue in this case. Pet. App. 1a. Because of his "sincerely held belief in Judaism," he is able to eat only kosher foods. Plaintiff's First Amended Complaint ¶ 9, *Cardinal v. Metrish*, No. 2:06-cv-232 (W.D. Mich. Feb. 8, 2007). On March 2, 2005, he was transferred to Kinross Correctional Facility to be placed in disciplinary segregation because the Hiawatha facility lacked disciplinary segregation facilities. Pet. App. 2a. As a matter of policy, the Kinross facility does not serve inmates kosher meals. *Id.* Consistent with this policy, for the next six days the prison refused to provide petitioner with food he could eat. Plaintiff's First Amended Complaint ¶¶ 15-23, *Cardinal*, No. 2:06-cv-232; *see also* Pet. App. 2a. This was despite the fact that he told staff of his religious dietary needs upon his arrival, sent a written message relaying the same information to

respondent, the Warden of both the Hiawatha and Kinross facilities, and made numerous written requests to staff members for kosher foods as simple as "an apple or some kind of vegetable." Plaintiff's First Amended Complaint ¶¶ 15, 19-23, *Cardinal*, No. 2:06-cv-232. Petitioner was finally transferred to a third facility that serves kosher meals to inmates in segregation, but because it took an additional two days for the new facility to provide him a kosher meal, petitioner ultimately was deprived of food for a total of eight days. Pet. App. 2a.

Petitioner filed suit against respondent in her official capacity, alleging in relevant part a violation of his rights under RLUIPA. *Id.* He sought both equitable relief and damages. Pet. App. 5a.

3. Adopting the United States Magistrate Judge's report and recommendation, the district court granted respondent's motion for summary judgment, holding that Michigan's sovereign immunity barred the RLUIPA damages claim, and that the RLUIPA claim for equitable relief was moot because petitioner had been transferred to a facility that served kosher meals. Pet. App. 27a.

4. The Sixth Circuit affirmed. Pet. App. 1a.

After affirming the dismissal of petitioner's claims for injunctive relief as moot, Pet. App. 5a-6a, the court found petitioner's claims for damages barred by the defendant's Eleventh Amendment immunity, Pet. App. 11a-12a. The court began by noting that because petitioner sued respondent in her official capacity, his suit was considered a suit against the State of Michigan for purposes of the Eleventh Amendment. Pet. App. 5a. The court

acknowledged that because RLUIPA clearly conditions receipt of federal prison funding on states' submitting to RLUIPA suits for "appropriate relief," states waive their Eleventh Amendment immunity to such suits by accepting federal funds. *See* Pet. App. 6a. The more difficult question, the court concluded, is whether "appropriate relief" includes monetary damages. *Id.* On that question, the court recognized, there is disagreement among the circuits. Pet. App. 6a-7a.

The court acknowledged that in *Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007), the Eleventh Circuit had held that Congress validly conditioned receipt of federal funds on a waiver of states' immunity to damages claims under RLUIPA. *See* Pet. App. 7a. On the other hand, the court explained that in *Madison v. Virginia*, 474 F.3d 118 (4th Cir. 2006), the Fourth Circuit held that although accepting federal prison funds subjected the state of Virginia to RLUIPA's substantive requirements, the statute does not unambiguously condition receipt of those funds on a waiver of immunity to a money damages remedy for violations of the statute. *See* Pet. App. 7a-8a. This view, the court of appeals noted, was subsequently adopted by the Fifth Circuit as well, in *Sossamon v. Lone Star State of Texas*, 560 F.3d 316 (5th Cir. 2009), *petition for cert. filed*, 77 U.S.L.W. 3657 (U.S. May 18, 2009) (No. 08-1438). *See* Pet. App. 9a.

The Sixth Circuit agreed with the Fourth and Fifth Circuits, and held that petitioner's RLUIPA damages claim is barred by the Eleventh Amendment because "appropriate relief" does not clearly and unequivocally condition the state of Michigan's

receipt of federal funds on a waiver of sovereign immunity to monetary damages. Pet. App. 11a-12a.

Judge Clay concurred in the result but dissented from the majority's decision to reach the Eleventh Amendment question, which he believed had not been adequately developed in the district court or briefed on appeal. Pet. App. 15a-18a.

## REASONS FOR GRANTING THE WRIT

This case presents the same question as the pending petition in *Sossamon v. Texas,* No. 08-1438. Agreeing with the Fifth Circuit's decision in that case, the Sixth Circuit here held, in acknowledged conflict with the law in the Eleventh Circuit, that the Eleventh Amendment bars money damages claims under RLUIPA. In addition to exacerbating a circuit conflict, this ruling effectively invalidates a key enforcement provision of a federal civil rights law. This Court's review is therefore warranted, either in *Sossamon* or in this case.

1. As discussed in greater detail in the *Sossamon* petition, there is a deep conflict among the circuit courts of appeal over the scope of states' waiver of sovereign immunity to RLUIPA claims by inmates in federally funded state prisons.

As the court of appeals recognized, the Eleventh Circuit has held that by accepting federal funds in light of RLUIPA's authorization of "appropriate relief," states waive their sovereign immunity to damages claims under the statute. In *Smith v. Allen*, the Eleventh Circuit held that RLUIPA's reference to "appropriate relief" "is broad enough to encompass the right to monetary damages" if a plaintiff proves a violation of the statute. *Smith*, 502 F.3d at 1270.

The Eleventh Circuit relied on *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), which held that the implied private right of action under Title IX (another Spending Clause statute) included all "appropriate relief," including damages. *Smith*, 502 F.3d at 1270-71; *Franklin*, 503 U.S. at 66, 72-73. The Eleventh Circuit noted that Congress enacted RLUIPA in 2000, against the background of *Franklin*'s direction to lower courts to presume that all appropriate remedies are available, and that this "appropriate relief" included a damages remedy. *Smith*, 502 F.3d at 1271 ("We assume that, when Congress [enacted RLUIPA], it was aware of *Franklin*'s presumption in favor of making all appropriate remedies available to the prevailing party.").

As the Sixth Circuit here described, it joined the Fourth and Fifth Circuits in holding precisely the opposite. These courts have concluded that even if the phrase "appropriate relief" would otherwise be construed to include money damages, the statute is nonetheless insufficiently clear to condition receipt of federal funds on a waiver of sovereign immunity to RLUIPA damages claims. Pet. App. 11a-12a; *Sossamon*, 560 F.3d at 331; *Madison*, 474 F.3d at 131. Moreover, in a recent decision, the Seventh Circuit has now joined suit as well. *See Nelson v. Miller*, No. 08-2044, 2009 WL 1873500, at *14 (7th Cir. July 1, 2009).

2. The conflict between circuits is entrenched, capable of resolution only by this Court. The Eleventh Circuit has denied rehearing en banc in a case conflicting with the Sixth Circuit's decision, *Smith v. Allen*, 277 Fed. Appx. 979 (11th Cir. 2008)

(order denying rehearing) and recently reaffirmed its position, *see Hathcock v. Cohen*, 287 Fed. Appx. 793, 798 n.6 (11th Cir. 2008). The Sixth Circuit, for its part, reached its decision fully cognizant of the contrary authority. Delaying review will only exacerbate, not eliminate, the circuit conflict. The critical analytical debate has already been fully ventilated, with much of the division turning on debates over the meaning of *this Court*'s precedent. Courts in future cases will simply pick a side without further analysis, as the Seventh Circuit recently did. *See, e.g., Nelson*, No. 08-2044, 2009 WL 1873500, at *14. Only this Court can bring the needed clarity to its precedent and provide stabilizing direction to the lower courts.

3. This Court's review is also warranted because the Sixth Circuit's decision effectively held unconstitutional a key enforcement provision of a civil rights law.

The court of appeals did not dispute that the most natural reading of RLUIPA's text—especially in light of *Franklin*'s use of the phrase "appropriate relief" to include damages in the context of another Spending Clause statute—would authorize a damages award against state defendants. But the court held that giving effect to the text so construed would violate the Eleventh Amendment, effectively invalidating an important provision of a federal statute.

This Court has consistently granted certiorari to review decisions declaring federal statutes unconstitutional even when those statutes have far less frequent application than RLUIPA. *See, e.g., United States v. Stevens*, 129 S. Ct. 1984 (2009);

*United States v. Morrison*, 529 U.S. 598 (2000); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *Clinton v. City of New York*, 524 U.S. 417 (1998); *see also* ROBERT L. STERN & EUGENE GRESSMAN, STEPHEN M. SHAPIRO, & KENNETH S. GELLER, SUPREME COURT PRACTICE 264 (9th ed. 2007) ("Where the decision below holds a federal statute unconstitutional . . . certiorari is usually granted because of the obvious importance of the case."). It should do so again here.

4. For the reasons set forth in the *Sossamon* petition, certiorari is also warranted because the decision below is wrong.

The Sixth Circuit correctly recognized that Congress had clearly conditioned receipt of federal prison funding on a state's waiver of sovereign immunity to RLUIPA suits for "appropriate relief." But in holding that the Eleventh Amendment prohibited construing "appropriate relief" to include damages because states lacked notice of that interpretation, the court of appeals contravened this Court's decision in *Barnes v. Gorman*, 536 U.S. 181 (2002). In *Barnes*, this Court considered the scope of remedies available under Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131 to 12165, and Section 505 of the Rehabilitation Act, 29 U.S.C. § 794a, which, in turn, incorporated the remedies the Court had implied under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7. *Id.* at 185. As explained above, in *Franklin* this Court had held that an implied private right of action under a Spending Clause statute includes all "appropriate relief." Thus, the question in *Barnes* was the same

question presented here—what constitutes "appropriate relief"? *See id.* at 185.

Like the Sixth Circuit here, this Court began with the principle that a remedy constitutes "appropriate relief" only when the state "is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* at 187. But in direct conflict with the decision in this case, the Court then held that "[a] funding recipient is generally on notice that it is subject *not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract*," including "compensatory damages." *Id.* (citations omitted) (emphasis added).

Accordingly, under *Barnes*, states are on notice that by accepting federal prison funding, they are liable for compensatory damages and would be even if RLUIPA was completely silent as to available remedies. That RLUIPA expressly authorizes "appropriate relief" using the exact words *Franklin* had previously construed to include money damages only enhances the notice provided to states that a consequence of accepting federal prison funding is the possibility of suits for damages under RLUIPA.

5. Accordingly, certiorari is warranted to review the Sixth Circuit's conclusion that the Eleventh Amendment precludes an award of damages to petitioner for the violation of his rights under RLUIPA. However, because the same question is presented in the already-pending petition in *Sossamon v. Texas*, the Court may wish to hold this petition pending the disposition of that case. In the alternative, if the Court views this case as a better vehicle for deciding the question presented in both

petitions, it should grant the petition in this case and hold the petition in *Sossamon*.

## CONCLUSION

The Court should hold the petition for a writ of certiorari in this case pending its disposition of the petition for a writ of certiorari in *Sossamon v. Texas*, petition for cert. pending, No. 08-1438 (filed May 18, 2009), and then dispose of this case accordingly.

Alternatively, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 23, 2009

# APPENDIX

**PUBLISHED**

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

Gerald William CARDINAL, Plaintiff-Appellant,

v.

Linda METRISH, Defendant-Appellee.

No. 08-1562.

April 24, 2009.

## OPINION

BERTELSMAN, District Judge. Plaintiff Gerald William Cardinal appeals the district court's grant of summary judgment in favor of the defendant Linda Metrish, the warden where he was incarcerated. The district court dismissed plaintiff's claims alleging an Eighth Amendment violation under 42 U.S.C. § 1983, as well as violations of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1 *et seq*. We AFFIRM.

## BACKGROUND

The plaintiff was an inmate confined at the Hiawatha Correctional Facility and a participant in

the kosher meal program. On March 2, 2005, the plaintiff received several misconduct charges and was placed in temporary segregation. Because the Hiawatha facility could only house inmates in temporary segregation for eight hours, the plaintiff was transferred to the Kinross Correctional Facility. Kinross, however, does not serve kosher meals.

While at the Kinross facility, the plaintiff refused the non-kosher meals. On Saturday, March 5, 2005, after the plaintiff refused to eat for 72 hours, the staff contacted Health Services, as required by Michigan Department of Corrections policy. On Monday, March 7, 2005, Defendant Metrish, the warden of both facilities, learned that the plaintiff was refusing non-kosher meals. On March 8, 2005, the defendant transferred the plaintiff to Chippewa Correctional Facility, which provides both kosher meals and temporary segregation.

The plaintiff filed a pro se complaint in the United States District Court for the Western District of Michigan asserting a § 1983 claim against the defendant, in her individual capacity, for a violation of his Eighth Amendment rights, and asserting a violation of RLUIPA against the defendant in her official capacity. The plaintiff sought damages in excess of $10,000 on each claim for the defendant's failure to provide him with kosher food, which resulted in his not eating for eight days.[1] The

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[1] In his amended complaint, the plaintiff alleges that he was denied kosher food for six days at the Kinross facility and that it took another two days to get kosher meals at the new facility. (District Court Docket Entry 20, ¶ 16).

defendant filed a motion for summary judgment. The district court adopted the report and recommendation of the United States Magistrate Judge and granted summary judgment to the defendant. The plaintiff appeals.[2]

## ANALYSIS

### The District Court did not Abuse its Discretion in Denying Discovery.

We review for an abuse of discretion a district court's decision to enter summary judgment without permitting discovery. *Short v. Oaks Corr. Facility*, 129 F. App'x 278, 280 (6th Cir. 2005). Rule 56(f) of the Federal Rules of Civil Procedure provides the "mechanism for a plaintiff and the courts to give effect to the well-established principle that 'the plaintiff must receive "a full opportunity to conduct discovery" to be able to successfully defeat a motion for summary judgment.'" *Id.* at 281 (quoting *Ball v. Union Carbide Corp.*, 385 F.3d 713, 719 (6th Cir. 2004)). Rule 56(f) provides that the plaintiff is required to file an affidavit or motion explaining what material facts he hopes to uncover by the requested discovery. *Id.* If the plaintiff makes only general and conclusory statements in his affidavit regarding the needed discovery, lacks any details or specificity, it is not an abuse of discretion for the district court to deny the request. *Id.*

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[2] The defendant did not file an appellate brief in this matter.

Here, the plaintiff argues that the district court erred in not permitting him to obtain the requested discovery, i.e., production of entries in the Kinross segregation log book from March 2, 2005 through March 8, 2005. The defendant introduced portions of the log book as exhibits in support of her motion for summary judgment. Upon receipt of these materials, the plaintiff filed a Rule 56(f) affidavit with his response to the motion for summary judgment, explaining that he did not know that a log book existed and requesting that the district court order the disclosure of the missing pages. The plaintiff's Rule 56(f) affidavit explained that through the additional discovery he hoped to discover:

> (1) that a staff member logged in an earlier date, reporting to Defendant Metrish that Plaintiff was going without food, (2) to see if Defendant, or someone in her office, contacted segregation staff about Plaintiff, (3) to see if staff logged in how many meals plaintiff didn't have, and (4) to see if segregation staff logged in when they were informed about Plaintiff's kosher food needs.

(District Court Docket Entry 28, ex. 2).

The issue of whether the defendant was notified that the plaintiff was going without food prior to March 7, 2005 goes to the heart of the defendant's defense. Even if there were additional entries in the segregation staff's log book regarding plaintiff's refusal to eat, these entries would not establish that the defendant had been informed of plaintiff's situation. Accordingly, we hold that the district court's order denying the plaintiff's request for additional discovery was not an abuse of discretion.

**The Defendant is Entitled to Eleventh Amendment Immunity on the RLUIPA Claim.**

Plaintiff seeks monetary damages, as well as declaratory and injunctive relief, asserting that the defendant violated RLUIPA by not providing him with kosher meals while he was incarcerated at the Kinross facility. RLUIPA provides:

> [n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. §§ 2000cc-1(a). RLUIPA defines "government" as including States and their agencies and departments, as well as persons acting under color of State law. 42 U.S.C. § 2000cc-5(4)(A). Plaintiff's RLUIPA claim against the defendant, a State official, in her official capacity is considered a claim against the State of Michigan. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). Accordingly, any immunity available to the State is available to the defendant in her official capacity. *Id.*

The plaintiff seeks declaratory and injunctive relief against the defendant for the alleged RLUIPA violation. The plaintiff, however, has been transferred from the Kinross facility to a facility that offers kosher meals. In addition, the Hiawatha

facility has since changed its policy to preclude transferring participants in the kosher meal program to the Kinross facility. Therefore, we find that the plaintiff's request for declaratory and injunctive relief is rendered moot. *Kensu v. Haigh*, 87 F.3d 172, 175 (6th Cir. 1996) (holding prisoner's claim for injunctive and declaratory relief mooted by his transfer to new facility).

The district court found that the plaintiff's claim for monetary damages against the defendant in her official capacity should be dismissed because the State of Michigan has not waived its Eleventh Amendment immunity to claims for damages under RLUIPA. The plaintiff argues that, by accepting federal funds for its prisons, the State waived its immunity for RLUIPA claims.

By accepting federal prison funds, States consent to provide "appropriate relief" to prisoners who suffer a RLUIPA violation. 42 U.S.C. §§ 2000cc-2(a), 2000cc-1(b)(1) (requiring all states that receive federal prison funds to comply with RLUIPA). RLUIPA provides that "[a] person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a). The issue before us is whether monetary damages are "appropriate relief" for violations of RLUIPA.

Neither the United States Supreme Court nor this court has ruled on the issue. There is also no consensus among the other Circuits as to whether a State's acceptance of federal prison funds constitutes a waiver of its sovereign immunity as to RLUIPA claims for damages. The Courts of Appeals for the Third, Fourth and Fifth Circuits, along with a district

court from this Circuit, have concluded that the States are immune from claims for monetary damages under RLUIPA. *See Sossamon v. Lone Star State of Texas,* No. 07-50632, 2009 WL 382260, at *7-8 (5th Cir. Feb. 17, 2009) (designated for publication); *Scott v. Beard*, 252 F. App'x 491, 492-93 (3d Cir. 2007); *Madison v. Virginia,* 474 F.3d 118, 122-23 (4th Cir. 2006); *Porter v. Caruso*, No. 1:05-cv-562, 2008 WL 3978972, at *3-7 (W.D. Mich. Aug. 22, 2008), *appeal docketed*, No. 08-2314 (6th Cir. Oct. 14, 2008). *See also Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006) (holding language in Religious Freedom Restoration Act, similar to that in RLUIPA, permitting suit for "appropriate relief," did not waive federal government's immunity to suits for damages). The Court of Appeals for the Eleventh Circuit, however, takes the opposite view and ruled that a State's receipt of federal prison funds constitutes a waiver of its sovereign immunity for suits seeking monetary damages under RLUIPA. *Smith v. Allen*, 502 F.3d 1255, 1271 (11th Cir. 2007).

In *Madison v. Virginia,* the plaintiff sued the Commonwealth of Virginia, alleging it violated RLUIPA by denying him kosher meals. *Madison*, 474 F.3d at 122-23. The district court held that by accepting federal prison funds, the Commonwealth of Virginia had waived its sovereign immunity for RLUIPA claims, including those for monetary damages. *Id.* at 123. The Court of Appeals for the Fourth Circuit disagreed, stating that, although Virginia consented, by accepting federal prison funds, to be subject to the substantive requirements of RLUIPA, the language of RLUIPA did not expressly and unequivocally extend its waiver of sovereign

immunity to suits seeking monetary damages. *Id.* at 129-33. The court explained:

> State sovereign immunity is among the Constitution's most foundational principles, *see, e.g., Brown v. N.C. Div. of Motor Vehicles,* 166 F.3d 698, 704 (4th Cir. 1999), and we may not "infer that a State's immunity from suit in the federal courts has been negated," *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 99, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). "[T]here can be no consent by implication or by use of ambiguous language." *Library of Congress v. Shaw,* 478 U.S. 310, 318, 106 S. Ct. 2957, 92 L. Ed. 2d 250 (1986) (quoting *United States v. N.Y. Rayon Importing Co.,* 329 U.S. 654, 659, 67 S. Ct. 601, 91 L. Ed. 577 (1947)). A waiver must be "unequivocally expressed in statutory text." *See Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996). For this reason, general participation in a federal program or the receipt of federal funds is insufficient to waive sovereign immunity. *See Atascadero [State Hosp.v. Scanlon],* 473 U.S. [234,] 246-47, 105 S. Ct. 3142 [(1985)]. Rather, "Congress must make its intention unmistakably clear in the language of the statute." *Hoffman v. Conn. Dep't of Income Maintenance,* 492 U.S. 96, 101, 109 S. Ct. 2818, 106 L. Ed. 2d 76 (1989) (plurality) (internal quotation omitted).

*Id.* at 129-30.

The Fourth Circuit concluded that "a waiver of sovereign immunity for some type of remedy does not

necessarily extend to suits for damages." *Id.* at 131 (quoting *Webman,* 441 F.3d at 1025). For a waiver of sovereign immunity to extend to claims for monetary damages, the waiver must "unambiguously" extend to such claims. *Id.* (quoting *Lane v. Pena,* 518 U.S. 187, 192 (1996)). Any purported waiver of sovereign immunity will be "strictly construed, in terms of its scope, in favor of the sovereign." *Lane,* 518 U.S. at 192. *See also Gomez-Perez v. Potter,* 128 S. Ct. 1931 (2008) (considering waiver of federal government's sovereign immunity).

Thus, the Fourth Circuit held that RLUIPA's "appropriate relief" language did not unequivocally waive the State's immunity from suit for monetary damages. RLUIPA "makes no reference to monetary relief - or even to sovereign immunity generally." *Madison,* 474 F.3d at 131. Thus, the court concluded that acceptance of federal prison funds under RLUIPA does not waive a State's immunity from suits for monetary damages. *Id.*

Similarly, the Fifth Circuit, finding the Fourth's Circuit's reasoning in *Madison* persuasive, recently held that the "appropriate relief" language contained in RLUIPA was "not sufficiently clear in light of the [Supreme] Court's sovereign-immunity jurisprudence." *Sossamon,* 2009 WL 382260 at *7. Accordingly, the court held that any claim under RLUIPA for monetary damages against the defendants in their official capacity was barred by the State's sovereign immunity. *Id.* at *8.

The plaintiff argues that the Sixth Circuit should adopt the reasoning of the Eleventh Circuit found in *Smith v. Allen.* In *Smith,* the court held that RLUIPA created a private cause of action for "appropriate

relief" against a State that accepted federal prison funds. *Smith,* 502 F.3d at 1269. The Eleventh Circuit, relying on *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992), stated that "where Congress ha[s] not given any guidance or clear indication of its purpose with respect to remedies, federal courts should presume the availability of all appropriate remedies." *Smith,* 502 F.3d at 1270. Thus, the *Smith* court concluded that the phrase "appropriate relief" as used in RLUIPA "is broad enough to encompass the right to monetary damages." *Smith,* 502 F.3d at 1270.

We disagree with the Eleventh Circuit's holding that *Franklin* is applicable to a claim against a State for money damages under RLUIPA. *Franklin* did not involve a claim of sovereign immunity. The Supreme Court has recognized that *Franklin* is not per se applicable to all claims against a State, but only to claims in which a State has expressly waived its sovereign immunity. *Lane*, 518 U.S. at 196-97 (finding Congress did not waive federal government's sovereign immunity for monetary damages for claims against it for violations of § 504(a) of Rehabilitation Act of 1973). In *Lane*, the Supreme Court explained:

> Petitioner's reliance on *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992), . . . is misplaced. In *Franklin*, we held only that the implied private right of action under Title IX of the Education Amendments of 1972 supports a claim for monetary damages. "[A]bsent clear direction to the contrary by Congress," we stated, "the federal courts have the power to award any

> appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Id.*, at 70-71, 112 S. Ct., at 1035. *Franklin*, however, involved an action against nonfederal defendants under Title IX. Although the Government does not contest the propriety of the injunctive relief Lane obtained, the Federal Government's sovereign immunity prohibits wholesale application of *Franklin* to actions against the Government to enforce § 504(a). As the Government puts it, "[w]here a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived."

*Id.*

As discussed above, a finding that a State has waived its sovereign immunity by accepting federal funds must be based on unequivocal language in the statute that makes the waiver unambiguous. Here, RLUIPA does not contain a clear indication that Congress unambiguously conditioned receipt of federal prison funds on a State's consent to suit for monetary damages.

We find the reasoning of the Fourth and Fifth Circuits consistent with the current Supreme Court case law requiring waivers of sovereign immunity to be "unequivocally expressed." *See, e.g.*, *Gomez-Perez*, 128 S. Ct. at 1942-43; *Lane*, 518 U.S. at 192; *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34, 37 (1992). We hold that, because RLUIPA's "appropriate relief" language does not clearly and

unequivocally indicate that the waiver extends to monetary damages, the Eleventh Amendment bars plaintiff's claim for monetary relief under RLUIPA.

**Defendant was Entitled to Summary Judgment on the § 1983 Claim Alleging an Eighth Amendment Violation.**

The plaintiff asserted a § 1983 claim against the defendant in her individual capacity for violations of his Eighth Amendment right to be free from cruel and unusual punishment for not providing him with kosher food, which resulted in his not eating for eight days. The Sixth Circuit has held that the deliberate and unnecessary withholding of food that is essential to normal health can constitute the deliberate indifference to medical needs that violates the Eighth Amendment. *See Cunningham v. Jones*, 567 F.2d 653, 656 (6th Cir. 1977).

To establish an Eighth Amendment violation, the plaintiff must show that the defendant acted with deliberate indifference to his basic needs. The Sixth Circuit recently explained:

> In order to hold a prison official liable for an Eighth Amendment violation, a plaintiff must demonstrate that the official acted with "deliberate indifference" to the inmate's safety. *See Watkins v. City of Battle Creek*, 273 F.3d 682 (6th Cir. 2001) (citing *Estelle v. Gamble,* 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)). Deliberate indifference is comprised of both an objective and a subjective component. *Farmer v. Brennan,* 511 U.S. 825, 835-57, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). The objective component

> requires that the deprivation alleged be "sufficiently serious," while the subjective component requires a plaintiff to establish that the government officials had a "sufficiently culpable state of mind." *Id.* at 834, 114 S. Ct. 1970.

*Farah v. Wellington*, 295 F. App'x 743, 749 (6th Cir. 2008). *See also Harrison v. Ash*, 539 F.3d 510, 517-18 (6th Cir. 2008). To establish the subjective component, the plaintiff must establish that "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). "[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." *Id.* at 838.

The case at bar is not a case in which the plaintiff was deliberately denied food. Instead, based upon an apparent administrative error, the plaintiff had been transferred to a facility that did not offer a kosher diet. The plaintiff does not allege that he was denied food, but that he was denied kosher food. The evidence establishes that the defendant was first made aware of the plaintiff's situation on Monday, March 7, 2005. In response, she transferred the plaintiff to a facility that provided kosher meals.

The district court correctly held that the plaintiff had not pointed to any evidence that the defendant knew and disregarded an excessive risk to his health or safety. Instead, the evidence established that as

soon as the defendant was made aware of the plaintiff's situation, she instituted a transfer to a facility that could accommodate plaintiff's kosher needs and security level. Thus, the plaintiff did not demonstrate that the defendant failed to act after being made aware of the facts. We hold that the district court correctly granted summary judgment to the defendant on plaintiff's § 1983 claim alleging a violation of his Eighth Amendment rights.

**Plaintiff has not Established a First Amendment Violation.**

The plaintiff argues that, even though he did not specifically allege such a violation in his complaint, the district court was required, by his pro se status, to consider a § 1983 claim for the violation of his First Amendment rights since the facts alleged were sufficient to assert such a claim. In its April 24, 2008 Order, the district court considered this argument in ruling on plaintiff's motion to amend the court's order entering summary judgment. (District Court Docket Entry 39). The district court found that, even if the plaintiff had asserted a § 1983 claim for a First Amendment violation, the defendant would have been entitled to summary judgment because the defendant was not actively involved in denying the plaintiff kosher meals.

We have held that, even if a plaintiff can prove a violation of his constitutional rights, his § 1983 claim must fail against a supervisory official unless "the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it." *Combs v. Wilkinson*, 315 F.3d 548, 558 (6th Cir. 2002) (quoting *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984)). *See also Copeland v. Machulis,*

57 F.3d 476, 481 (6th Cir. 1995). "At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." *Combs*, 315 F.3d at 558 (quoting *Hays v. Jefferson County, Ky.*, 668 F.2d 869, 874 (6th Cir. 1982)).

Here, the evidence established that upon learning of the plaintiff's situation, the defendant began procedures to transfer the defendant to a facility that could accommodate his needs. Since the plaintiff does not allege that the defendant was actively involved in the denial of kosher food, we find that the district court's analysis of the issue was correct.

For the reasons discussed above, the judgment of the district court is **AFFIRMED**.

## CONCURRING IN PART, DISSENTING IN PART

CLAY, Circuit Judge, concurring in part and dissenting in part. I concur in the majority's holding that the district court did not abuse its discretion in denying further discovery and that Defendant was entitled to summary judgment on Cardinal's § 1983 claims. I also agree that Cardinal's claims for declaratory or injunctive relief are moot because Cardinal has been transferred to a different facility which provides kosher meals, and because the Michigan Department of Corrections has changed its policy to preclude transferring participants in the kosher meal program to facilities that have no such program. I write separately, however, because I do not believe that this is a case in which this Court should decide whether the doctrine of sovereign

immunity bars a plaintiff from recovering monetary damages under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq*.

As the majority indicates, RLUIPA states that "[a] person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government[,]" 42 U.S.C. § 2000cc, but courts are split on the issue of whether "appropriate relief" encompasses monetary relief. *Compare Smith v. Allen*, 502 F.3d 1255, 1271 (11th Cir. 2007) (holding that the phrase "appropriate relief" in RLUIPA encompasses monetary as well as injunctive relief), *and Price v. Caruso*, 451 F. Supp. 2d 889, 895 (E.D. Mich. 2006) (holding that a plaintiff "may have a cognizable claim for monetary damages . . . under RLUIPA"), *with Madison v. Virginia*, 474 F.3d 118, 131 (4th Cir. 2006) (concluding that RLUIPA's "appropriate relief against a government" language "falls short of the unequivocal textual expression necessary to waive State immunity from suits for damages"). Prior to today's decision, this Court, like the Supreme Court, had not expressed an opinion on the matter.

This is not a suitable case for resolving the issue of what constitutes "appropriate relief" under the statute, or more specifically, whether "appropriate relief" should be held to encompass money damages. This is because the factual record is woefully underdeveloped and the briefing of the legal issues is completely inadequate–undoubtedly due in large measure to the fact that Plaintiff is proceeding *pro se* without the benefit of legal representation, and Defendant has failed in its professional

responsibilities to this Court by declining to file the requisite brief on appeal. Inexcusably, the defense's only filing before this Court was a one-page letter brief stating that Defendant would rely upon the district court's decision and the briefs filed before the district court. Cardinal, proceeding *pro se*, attempted to address the sovereign immunity issue in his appellate brief, but his arguments are less than a picture of clarity and Plaintiff acknowledges that he "is substantially limited in law and he has had problems with law library access." (Cardinal's Br. at 1.) The case was submitted on the briefs without oral argument, and this Court was left with little, if any, developed argument as to the propriety of applying the doctrine of sovereign immunity to RLUIPA claims.

Perhaps more importantly, it is not clear to me that Cardinal has raised a cognizable claim under RLUIPA, which states that "no government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . ." 42 U.S.C. § 2000 cc-1(a). Beyond asserting that he required and was denied a kosher diet, Cardinal does not describe with any particularity his religious dietary needs, the actual food that was provided to him, and what injuries he actually suffered. The record is devoid of any explanation as to whether *some* of the food served to Plaintiff in the non-kosher prison environment, especially vegetables, might have been consumed by him without violating his kosher dietary restrictions. Nor is it al all clear whether Plaintiff, operating pursuant to the doctrine of "necessity," would have been permitted, in the interest of preserving his health and welfare, to

consume non-kosher food products, where no kosher food was available, without violating his religious tenets. In other words, the record below is woefully underdeveloped. While we are to construe *pro se* petitions liberally in favor of the plaintiff, *see Boswell v. Mayer*, 169 F.3d 384, 387 (6th Cir. 1999), this record offers very little to support Cardinal's RLUIPA claim or to justify the need to resolve on behalf of the circuit the availability of money damages under the statute.

In view of the constraints presented by the instant case, I would be inclined to instruct the court below to dismiss Cardinal's RLUIPA claim without prejudice and to refrain from addressing whether the doctrine of sovereign immunity bars a plaintiff from recovering monetary relief under RLUIPA. I therefore respectfully dissent with regard to that portion of the majority opinion.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF MICHIGAN**
**NORTHERN DIVISION**

**GERALD CARDINAL**

**v.**

**LINDA METRISH**

**2:06-CV-232**

**OPINION AND ORDER APPROVING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

The Court has reviewed the Report and Recommendation filed by the United States Magistrate Judge in this action on November 14, 2007. The Report and Recommendation was duly served on the parties. The Court has received objections from Plaintiff. In accordance with 28 U.S.C. § 636(b)(1), the Court has performed *de novo* consideration of those portions of the Report and Recommendation to which objection has been made. The Court now finds the objections to be without merit.

Plaintiff filed suit against Defendant, Linda Metrish, in her individual capacity for violations of

the Eighth Amendment and in her official capacity for violations of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc, *et al.* Plaintiff was confined at the Hiawatha Correctional Facility ("HTF") and was a participant in the Kosher meal program. On March 2, 2005, Plaintiff was issued several misconduct charges and was placed in temporary segregation. Because HTF inmates can only be housed in temporary segregation for eight hours, Plaintiff was placed in temporary segregation at Kinross Correctional Facility (KCF). KCF does not serve Kosher meals, and Plaintiff refused the non-Kosher meals provided to him. After Plaintiff refused meals for 72 hours, KCF segregation staff, pursuant to MDOC policy, notified Health Services on Saturday March 5, 2005, that Plaintiff was refusing meals. Metrish, the warden of HTF and KCF, first learned on Monday March 7, 2005, that Plaintiff was refusing non-Kosher meals and that Kosher meals were not available at KCF. On March 8, 2005, Plaintiff was transferred to Chippewa Correctional Facility where he could receive Kosher meals while placed in temporary segregation.

Plaintiff alleges that Metrish, in her individual capacity, violated the Eighth Amendment. Plaintiff also sued Metrish in her official capacity for violating the RLUIPA. Metrish moved for summary judgment, and the magistrate issued a report and recommendation that the Court grant Metrish's motion for summary judgment on the Eighth Amendment claim. For the RLUIPA claim, the magistrate recommended granting Metrish's motion because Metrish is immune from suit for monetary damages in her official capacity and because

Plaintiff's claims involving equitable relief were mooted by his transfer to a new prison. Plaintiff filed objections regarding both conclusions.

*RLUIPA*

The RLUIPA provides that:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person–
>
> (1) is in furtherance of a compelling governmental interests; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1. Regarding relief, the statute states that "[a] person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a).

The issue of liability under the RLUIPA remains unresolved in many courts. Courts are split on whether the RLUIPA provides a cause of action against governmental employees in their individual capacity. *Smith v. Allen*, 502 F.3d 1255, 1272 (11th Cir. 2007) (collecting cases); *Madison v. Virginia*, 474 F.3d 118, 130 n. 3 (4th Cir. 2006) (collecting cases). It is unnecessary for the Court to resolve this issue because Plaintiff withdrew his RLUIPA claim against Metrish in her individual capacity. However,

Plaintiff's claim against Metrish in her official capacity is a source of debate as well. Courts are split on whether a plaintiff may sue an individual in his or her official capacity for monetary damages under the RLUIPA. *Compare Smith*, 502 F.3d 1255 (holding that the RLUIPA contains a waiver of sovereign immunity for monetary damages claims), *and Price v. Caruso*, 451 F.Supp.2d 889 (E.D. Mich. 2006) (same), *with Madison*, 474 F.3d 118 (holding that the RLUIPA contains a waiver of sovereign immunity but that the waiver does not extend to monetary damages).

Suits against state officials in their official capacity are treated as suits against the State. *Hafer v. Melo*, 502 U.S. 21, 25, 112 S.Ct. 358, 361 (1991). As such, "the only immunities available to the defendant in an official-capacity action are those that the governmental entity possesses." *Id.*, 112 S.Ct. at 362. Metrish argues that Plaintiff's claim for monetary relief against her in her official capacity is barred by the Eleventh Amendment. Plaintiff, relying on *Price*, 451 F.Supp.2d at 902, responds that the State waived its sovereign immunity by accepting federal funds conditioned on waiver. Plaintiff is correct that "if a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 105 S.Ct. 3142, 3145 (1985). However, courts "will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 1361 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171, 29 S.Ct. 458, 464 (1909)).

The statute specifically provides that a person may "assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a). The statute defines government to include states, state agencies, and any other person acting under color of state law. 42 U.S.C. § 2000cc-5(4). Therefore, the RLUIPA creates a cause of action against the State, and "[b]y voluntarily accepting federal correctional funds, it consented to federal jurisdiction for at least some form of relief." *Madison*, 474 F.3d at 130. Thus, the Court agrees with both the Fourth and Eleventh Circuits that states have waived their sovereign immunity, in some form, for causes of action under the RLUIPA.

However, the difficult and divisive question is whether that waiver extends to monetary damages. This is because "[a] waiver of sovereign immunity for some type of remedy does not necessarily extend to suits for damages." *Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1025 (D.C. Cir. 2006). The Supreme Court has articulated several principles for a court to consider when determining whether a waiver of sovereign immunity extends to monetary damages. First, "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 2096 (1996). Second, "the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Id.* at 193, 116 S.Ct. at 2097. Third, legislative history is immaterial because "the 'unequivocal expression' of elimination of sovereign immunity that [the Court] insist[s] upon is an expression in the statutory text."

*United States v. Nordic Village, Inc.*, 503 U.S. 30, 37, 112 S.Ct. 1011, 1016 (1992). Thus, if a waiver of sovereign immunity is susceptible to multiple interpretations – one which includes monetary damages and one which does not – the waiver does not extend to monetary damages. *See Id.*, 112 S.Ct. at 1016.

The statute provides that a person may bring a cause of action against the government and obtain "appropriate relief." 42 U.S.C. § 2000cc-2(a). The term "appropriate relief" is susceptible to various interpretations. It is possible to interpret "appropriate relief" to cover all types of relief – both equitable and monetary. "However, another plausible reading is that 'appropriate relief' covers equitable relief but not damages, given Congress's awareness of the importance of sovereign immunity and its silence in the statute on the subject of damages." *Webman*, 441 F.3d at 1026 (construing same phrase contained in the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, *et al.*). Because this provision is amenable to multiple interpretations which may or may not include monetary relief, the phrase "appropriate relief" is not the type of unequivocal waiver of immunity from monetary damages required. *Madison*, 474 F.3d at 132.

Moreover, the Court is not convinced by the Eleventh Circuit's argument in *Smith*. The *Smith* panel relied on the Supreme Court's opinion in *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 112 S.Ct. 1028 (1992). In *Franklin*, the Supreme Court construed what remedies were available for violations of Title IX. The Court reiterated, and relied on, the traditional presumption that courts "presume the availability of all appropriate remedies unless

Congress has expressly indicated otherwise." *Id.* at 66, 112 S.Ct. at 1032. This presumption was in favor of both injunctive and monetary relief. *Smith*, 502 F.3d at 1270. Thus, according to the *Smith* court, because Congress did not specifically exclude monetary damages for violations of the RLUIPA, the term appropriate relief must include them. *Id.* This analysis, however, fails to account for one crucial difference: context. The Supreme Court in *Franklin* was engaging in pure statutory interpretation separate and distinct from any considerations of sovereign immunity. Thus, the Court was neither bound by nor influenced by the principle that waivers of sovereign immunity must be strictly construed in favor of immunity and that waivers must be unequivocal. A generally applicable presumption of statutory interpretation loses its relevance when confronted with contrary principles of law specific to the issue at hand. In the context of waivers of sovereign immunity, those principles are clear: the waiver must unequivocally extend to monetary damages.

Because the RLUIPA does not contain an unambiguous waiver of sovereign immunity for monetary damages, Plaintiff may not state a claim for monetary damages against Metrish for violations of the RLUIPA. Additionally, Plaintiff's claims for equitable relief are moot because Plaintiff has been transferred from the prison where the incident occurred. *Kensu v. Haigh*, 87 F.3d 172, 175 (6th Cir. 1996). Thus, the Court will grant summary judgment in Metrish's favor on Plaintiff's RLUIPA claims.

*Eighth Amendment*

Plaintiff also sued Metrish in her individual capacity for violations of the Eighth Amendment. The Eighth Amendment provides a prisoner with the "right not to have prison officials act with deliberate indifference to his health and safety." *LeMarbe v. Wisneski*, 266 F.3d 429, 435 (6th Cir. 2001). However, "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 1979 (1994). The magistrate recommends that the Court grant summary judgment in Metrish's favor because there is no evidence demonstrating that Metrish was aware of Plaintiff's situation. Metrish was not aware that Plaintiff was refusing meals because they were non-Kosher until Monday March 7, 2007. Upon learning of this, Metrish immediately transferred Plaintiff to a facility that could accommodate his dietary needs. Thus, Metrish neither knew of nor disregarded an excessive risk to Plaintiff's health or safety. Therefore, Plaintiff cannot prevail in his Eighth Amendment claim against Metrish.[1]

**Conclusion**

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[1] Plaintiff also argues that with further discovery he could prove Metrish was aware that he was refusing meals sooner. However, this assertion appears to be unfounded and is rebutted by the evidence, including an affidavit from Metrish.

Plaintiff's claim under the RLUIPA for injunctive relief is moot because Plaintiff has been transferred. His claim for damages against Metrish in her official capacity for violating the RLUIPA is barred by sovereign immunity. Finally, the Court grants summary judgment in Metrish's favor on Plaintiff's Eighth Amendment claim because there is no genuine issue of material fact that Metrish was aware of and disregarded an excessive risk to Plaintiff's health and safety. Therefore,

**IT IS HEREBY ORDERED** that the Report and Recommendation of the Magistrate Judge (docket no. 33) is **APPROVED AND ADOPTED**.

**IT IS FURTHER ORDERED** that Defendant's Motion for Summary Judgment (docket no. 22) is **GRANTED**.

**This case is concluded.**

Dated: March 13, 2008

/s/ Gordon J. Quist

GORDON J. QUIST

UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF MICHIGAN**
**NORTHERN DIVISION**

**GERALD CARDINAL**

**v.**

**LINDA METRISH**

**2:06-CV-232**

**REPORT AND RECOMMENDATION**

Plaintiff Gerald Cardinal filed this prisoner 42 U.S.C. § 1983 action against defendant Linda Metrish. Defendant Metrish is the Warden at Hiawatha Correctional Facility (HTF) and Kinross Correctional Facility (KCF). Plaintiff's First Amended Complaint alleges that he is suing defendant Metrish in her individual capacity for violations of the Eighth Amendment and in her official capacity under the Religious Land Use and Institutionalized Persons Act. Plaintiff was confined at the Hiawatha Correctional Facility and was a participant in the Kosher meal program at the facility. Plaintiff was involved in an incident on March 2, 2005, where plaintiff was issued several misconduct charges. As a result of the charges, plaintiff was placed in temporary segregation. HTF

inmates can only be housed in temporary segregation for a maximum of eight hours. Plaintiff was temporarily placed in segregation at KCF pending the result of the misconduct charges. Plaintiff refused his meals at KCF, because they were not Kosher. KCF does not serve Kosher meals. MDOC policy requires staff to report to Health Services when an inmate refuses meals over a 72 hour period. On Saturday March 5, 2005, KCF segregation staff notified Health Services that plaintiff had refused meals. On Monday March 7, 2005, defendant Metrish first learned that plaintiff was refusing meals because he could not receive a Kosher meal at KCF. Plaintiff was transferred to the Chippewa Correctional Facility (URF). After this incident the procedure was changed so that an inmate on an approved Kosher diet who requires a transfer from HTF to a segregation unit will not be transferred to KCF.

Defendant Metrish moves for summary judgment. Summary judgment is appropriate only if the moving party establishes that there is no genuine issue of material fact for trial and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). If the movant carries the burden of showing there is an absence of evidence to support a claim or defense, then the party opposing the motion must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. *Id.* at 324-25. The nonmoving party cannot rest on its pleadings but must present "specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quoting Fed. R.

Civ. P. 56(e)). The evidence must be viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). Thus, any direct evidence offered by the plaintiff in response to a summary judgment motion must be accepted as true. *Muhammad v. Close*, 379 F.3d 413, 416 (6th Cir. 2004) (*citing Adams v. Metiva*, 31 F.3d 375, 382 (6th Cir. 1994)). However, a mere scintilla of evidence in support of the nonmovant's position will be insufficient. *Anderson*, 477 U.S. at 251-52. Ultimately, the court must determine whether there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252. *See also Leahy v. Trans Jones, Inc.*, 996 F.2d 136, 139 (6th Cir. 1993) (single affidavit, in presence of other evidence to the contrary, failed to present genuine issue of fact); *cf. Moore, Owen, Thomas & Co .v. Coffey*, 992 F.2d 1439, 1448 (6th Cir. 1993) (single affidavit concerning state of mind created factual issue).

Plaintiff argues that defendant Metrish, in her official capacity, violated his rights under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1. Section 2000cc-1 states:

> (a) General Rule
>
> > No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person–

> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

The Eleventh Amendment bars litigants from suing a state in federal court. When a suit for damages is brought against a state official in his official capacity, the case is one against the state and is barred by the Eleventh Amendment. *Hafer v. Melo*, 502 U.S. 21 (1991). Such a suit "generally represent[s] only another way of pleading an action against an entity of which an officer is an agent." *Id.* at 25 (*quoting Monell v. New York City Department of Social Services*, 436 U.S. 658, 690, n.55 (1978)). *See also Kentucky v. Graham*, 473 U.S. 159, 165 (1985). As a result, the suit is no different from one naming the state itself. *Hafer*, 502 U.S. at 26 *(quoting Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989)). Accordingly, plaintiff is not entitled to damages against defendant Metrish under the RLUIPA. *Farnsworth v. Baxter*, 2007 WL 2793364, slip. op. (W.D. Tenn., Sept. 26, 2007). *See also Berryman v. Graholm*, 2007 WL 2259334 (E.D. Mich, Aug. 3, 2007) (denying claims under the RLUIPA involving the temporary removal of prisoners from the Kosher meal plan). In *Berryman*, the court found that a temporary removal of prisoners' Kosher meals could not substantially burden the practice of Judaism. Further, the court held that no damages were allowable under the Act and the transfer of the prisoners to a new prison mooted all equitable claims. Similarly, in this case, plaintiff has been transferred to a new prison. Plaintiff's claims involving equitable relief should

also be dismissed. *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *Henderson v. Martin*, 73 Fed. Appx. 115, 117 (6th Cir. 2003); *Kensu v. Haigh*, 87 F.3d 172, 175 (6th Cir. 1996).

Plaintiff has also asserted that his Eighth Amendment rights were violated by defendant Metrish because he was denied Kosher meals. The Eighth Amendment imposes a constitutional limitation on the power of the states to punish those convicted of crimes. Punishment may not be "barbarous" nor may it contravene society's "evolving standards of decency." *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). The Amendment, therefore, prohibits conduct by prison officials that involves the "unnecessary and wanton infliction of pain." *Ivey v. Wilson*, 832 F.2d 950, 954 (6th Cir. 1987) (per curiam) (quoting *Rhodes*, 452 U.S. at 346). The deprivation alleged must result in the denial of the "minimal civilized measure of life's necessities." *Rhodes*, 452 U.S. at 347; *see also Wilson v. Yaklich*, 148 F.3d 596, 600-601 (6th Cir. 1998). The Eighth Amendment is only concerned with "deprivations of essential food, medical care, or sanitation" or "other conditions intolerable for prison confinement." *Rhodes*, 452 U.S. at 348 (citation omitted). Moreover, "not every unpleasant experience a prisoner might endure while incarcerated constitutes cruel and unusual punishment within the meaning of the Eighth Amendment." *Ivey*, 832 F.2d at 954.

Plaintiff was not denied meals. In fact, he refused the available meals because they were not Kosher. Defendant Metrish asserts that she was not personally involved in plaintiff's placement at KTF or the serving of meals to plaintiff while he was

temporarily housed at KTF. In fact, as soon as defendant Metrish learned that plaintiff was refusing meals and the reason why he was refusing meals, she immediately had plaintiff transferred to a facility which would accommodate his religious requirements and security classification. Under these circumstances, defendant Metrish could not have violated plaintiff's Eighth Amendment rights. It is further noted that plaintiff's assertion that discovery could somehow help him defeat defendant's motion summary judgment is, in the opinion of the undersigned, unfounded.

Accordingly, it is recommended that defendant's Motion Summary Judgment (Docket #22) be granted and this case be dismissed in its entirety.

NOTICE TO PARTIES: Objections to this Report and Recommendation must be served on opposing parties and filed with the Clerk of the Court within ten (10) days of receipt of this Report and Recommendation. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b); W.D. Mich. LCivR 72.3(b). Failure to file timely objections constitutes a waiver of any further right to appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn*, 474 U.S. 140 (1985).

/s/ Timothy P. Greeley
TIMOTHY P. GREELEY
UNITED STATES MAGISTRATE JUDGE

Dated: November 14, 2007

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(2)

No. 09-109

Supreme Court, U.S.
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In the Supreme Court
of the United States

GERALD WILLIAM CARDINAL,
*Petitioner,*

v

LINDA METRISH,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

**BRIEF IN OPPOSITION**

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## QUESTION PRESENTED

Whether the words "appropriate relief" in Section 2000cc-2 of the Religious Land Use and Institutionalized Persons Act clearly and unequivocally indicate that the States and state officials waived their sovereign immunity under the Eleventh Amendment from monetary damages by accepting federal funds.

## PARTIES TO THE PROCEEDING

The Petitioner in this matter is Gerald William Cardinal, an inmate, who is incarcerated in Michigan. The Respondent Linda M. Metrish is the warden of the Hiawatha and Kinross Correctional Facilities.

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## JURISDICTION

Respondent Linda Metrish agrees with Petitioner Gerald Cardinal's jurisdictional statement.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth in Petitioner's petition (Pet. 1-3).

## COUNTER-STATEMENT OF THE CASE

### Facts and Proceedings

Cardinal maintains that Metrish violated his rights under the Religious Land Use and Institutionalized Persons Act (RLIUPA). That statute, in pertinent part, provides:

> No government shall impose a substantial burden on the religious exercise of a person residing or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that the imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[1]

---

[1] 42 U.S.C. § 2000cc-1(a).

RLUIPA further provides that "A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain *appropriate relief* against a government."[2] In passing RLUIPA, Congress used its authority under the Spending Clause.[3] RLUIPA imposes a heightened statutory protection on any program or activity that receives federal financial assistance.[4]

In 2006, Cardinal, a Michigan inmate now on parole, filed suit seeking monetary and equitable relief against Metrish, the Warden of the Hiawatha Correctional Facility (HTF) and the Kinross Correctional Facility (KCF)[5] in her individual capacity for violations of his rights under the Eighth Amendment, and against her in her individual and official capacities for violations of RLUIPA.[6] Cardinal subsequently withdrew his claims against Metrish in her individual capacity under RLUIPA.

Cardinal was housed at HTF in 2005. While at HTF, Cardinal participated in the kosher meal program. On March 2, 2005, Cardinal received several major misconduct violations that required him to be placed in temporary segregation. HTF inmates can only be held in segregation for eight hours so prison officials transferred Cardinal to KCF on March 2, 2005. KCF did not serve kosher meals. Cardinal refused to eat non-kosher meals while at KCF.

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[2] 42 U.S.C. § 2000cc-2(a). (emphasis added)

[3] U.S. CONST, art. I, § 8, cl. 1.

[4] 42 U.S.C. § 2000cc-1(b)(1).

[5] Metrish retired from HTF and KCF on December 14, 2007.

[6] 42 U.S.C. § 2000cc, *et seq.*

Pursuant to Michigan Department of Corrections (MDOC) policy, segregation staff at KCF observed Cardinal for seventy-two hours and then notified health services on March 5, 2005, that Cardinal refused his meals.

Metrish did not become aware that Cardinal refused his non-kosher meals until March 7, 2005. (Pet. App. 26a).

The following day, on March 8, 2005, Cardinal was transferred to a temporary segregation unit at the Chippewa Correctional Facility. The Chippewa facility accommodated Cardinal's dietary needs.

Regarding the federal suit Cardinal filed under the Eighth Amendment and RLUIPA, Metrish moved for summary judgment. A magistrate judge subsequently issued a report and recommendation recommending dismissal of Cardinal's complaint. The district court adopted the magistrate judge's report and recommendation and held: that Metrish was entitled to sovereign immunity as to Cardinal's RLUIPA claim for money damages; that Cardinal's equitable relief claim was moot because the MDOC transferred him to a facility that provided kosher meals; and that Metrish was entitled to summary judgment regarding Cardinal's Eighth Amendment claim (Pet. App. 19a-27a).

Cardinal appealed to the Sixth Circuit Court of Appeals. The Court of Appeals affirmed the district court (Pet. App. 1a-18a). In affirming the district court the Court of Appeals held that "[B]ecause RLUIPA's 'appropriate relief' language does not clearly and unequivocally indicate that the waiver extends to

monetary damages, the Eleventh Amendment bars plaintiff's claim for monetary relief under RLUIPA."[7]

## REASONS FOR DENYING THE PETITION

This case presents a poor vehicle for resolution of any conflict among the circuits because the only issue at stake is "nominal damages." There are four circuits, including the Sixth Circuit here, which have rejected the claim that RLUIPA is sufficiently clear to serve as a waiver by the States of their sovereign immunity under the Eleventh Amendment. The departing circuit, the Eleventh, concluded that the RLUIPA was sufficiently specific so as to encompass monetary damages. But the Eleventh Circuit also concluded that the prisoner would be limited to "nominal damages" under the Prison Litigation Reform Act (PLRA) in the absence of a showing of physical injury.

Here, Cardinal never alleged that he suffered a physical injury. Therefore, even if this Court were to find that Cardinal was entitled to monetary damages under RLUIPA, PLRA would act as independent bar to his ability to collect other than "nominal" damages. This Court should await a RLUIPA case that arises from its protection of religious liberty from a land-use regulation where significant monetary damages will likely be at issue.

Moreover, Cardinal attempts to portray this case as one that presents an "entrenched" conflict that this Court must resolve now. Any conflict, however, is not deeply entrenched. All but one of the circuit courts that have interpreted RLUIPA's "appropriate relief" language have reached the same conclusion – that such language

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[7] *Cardinal*, 564 F.3d at 801.

is insufficiently clear to condition receipt of federal funds on a waiver of sovereign immunity as to damage claims under RLUIPA.

And as to the Eleventh Circuit, it should be given an opportunity to revisit its holding, particularly in light of the four other circuit court opinions including this one that have been decided this year with all of those circuits concluding that the RLUIPA language was not sufficiently clear to determine that sovereign immunity from money damages was waived. The decision of the Sixth Circuit, along with those of the Fourth, Fifth, Seventh, and Eighth circuits, are better-reasoned – if this Court were inclined to reach this issue in a case arising from an institutionalized person, it should examine an Eleventh Circuit decision on the issue.

Finally, Cardinal argues that this Court should grant certiorari because the Court of Appeals effectively held a portion of RLUIPA unconstitutional. But the Court of Appeals never held that Congress lacked the authority to condition the disbursement of federal funds on a waiver of immunity. Rather, the Court of Appeals held that Congress had chosen not to exercise its power in this instance. The Court of Appeals simply applied the rules of statutory construction and held that Congress chose not to exercise its power to condition the disbursement of federal funds on a waiver of immunity.

## I. This Court should deny review because the Prison Litigation Reform Act's physical injury requirement would act as an independent bar to Cardinal's ability to obtain any damages other than "nominal" damages.

Even if this Court were to adopt Cardinal's argument that he is entitled to money damages, the PLRA acts as an independent bar to his ability to collect damages.[8] The PLRA provides that a prisoner may not bring an action for mental or emotional injuries without demonstrating a physical injury. The PLRA's damage prohibition explicitly applies to RLUIPA.[9]

A review of the district court record indicates that Cardinal did not allege any sort of physical injury that would allow him to proceed under the PLRA. At best, Cardinal could collect nominal damages for a violation of his rights under RLUIPA. In rejecting the Fourth Circuit's reasoning in *Madison v. Virginia,*[10] the Eleventh Circuit determined that only "nominal damages" would be available for the prisoner:

> Here, Smith [i.e., the prisoner] has alleged violations of RLUIPA due to the burden placed upon his religious exercise, but no physical harm. He seeks nominal, compensatory, and punitive damages. It is clear from our case law, however, that the latter two types of damages are precluded under the PLRA, *Napier*, 314 F.3d at 532, but that nominal damages may still be recoverable. *Hughes*, 350 F.3d at 1162. Thus, although we

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[8] 42 U.S.C. § 1997e(e).

[9] 42 U.S.C. § 2000cc-2(e).

[10] *Madison v. Virginia,* 474 F.3d 118 (4th Cir. 2006).

> conclude, as a general matter, that RLUIPA's phrase "appropriate relief" contemplates monetary as well as injunctive relief, in this case it is clear that Smith's monetary award, if any, will be limited to a grant of nominal damages, in light of the limiting language of § 1997(e).[11]

This Court would be better served by waiting and deciding a case from the land-use portion of the statute where more than nominal damages are available to a plaintiff. The district court and the Court of Appeals both concluded that Cardinal did not set forth a claim under the Eighth Amendment. Thus, even if this Court were to resolve this issue in Cardinal's favor, he would still be barred from collecting damages under the PLRA.

Rather than grant certiorari to evaluate an issue that ultimately only implicates "nominal" damages, this Court should await an issue that arises from RLUIPA's statutory protections related to land use regulations. See 42 U.S.C. § 2000cc-a(1) ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person[.]"). Although the issue whether an institutionalized person's rights under RLUIPA were violated is a significant one, the importance of whether the States have waived their protection from money damages under the Eleventh Amendment is blunted where the States will only be subject to "nominal" damages.

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[11] *Smith v. Allen*, 502 F.3d 1255, 1271 (11th Cir. 2007).

## II. The conflict over whether RLUIPA's "appropriate relief" language is not fully developed so as to warrant this Court's review.

### A. The conflict identified by Cardinal is not entrenched.

At best, Cardinal has identified a shallow conflict between the circuit courts. To date, five circuits have held that RLUIPA's "appropriate relief" language does not authorize suits for damages against the States or state officials when sued in their official capacities.[12] Specifically, those circuits (Fourth, Fifth, Seventh, and Eighth) concluded that the language contained in RLUIPA did not provide a clear enough waiver to States and state officials that they waived their sovereign immunity under the Eleventh Amendment. The D.C. Circuit reached the same conclusion in examining the phrase "appropriate relief" in the Religious Freedom Restoration Act concerning whether the federal government waived its sovereign immunity to monetary damages.[13]

The Eleventh Circuit in *Smith v. Allen* reached the opposite conclusion holding that the term "appropriate relief" encompassed both injunctive and monetary

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[12] *Madison v. Virginia*, 474 F.3d 118 (4th Cir. 2006); *Sossamon v. Lone Star State of Texas*, 560 F.3d 316 (5th Cir. 2009); *Cardinal v. Metrish*, 564 F.3d 794 (6th Cir. 2009); *Nelson v. Miller*, 570 F.3d 868 (7th Cir. 2009); *Van Wyhe v. Reisch*, __ F.3d __ (8th Cir. 2009), 2009 U.S. App LEXIS 20235 (8th Cir. 2009).

[13] *Webman v. Federal Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006)(Congress need not use magic words to waive sovereign immunity, but the language it chooses must be unequivocal and unambiguous. RFRA's text falls short on this standard. We therefore hold that RFRA does not waive the federal government's sovereign immunity for damages.")(citation omitted).

relief.[14] The Eleventh Circuit reasoned that since the term did not expressly exclude money damages that federal courts should presume that damages are available.[15]

Contrary to Cardinal's assertion, the conflict referenced above is far from "entrenched" (Pet. 10). It is important to note that, with the exception of the Fourth Circuit's decision in *Madison v. Virginia*, the Eleventh Circuit decided *Smith* before any of the other circuit courts had an opportunity to review the issue of whether RLUIPA's "appropriate relief" language permitted damages against States and state officials. The four circuit courts that have addressed the issue since the *Smith* decision reached the opposite conclusion. Each of those four circuits identified serious flaws in the *Smith* decision.

The Eleventh Circuit has not had the opportunity to confront the four decisions from the other circuits this year that have addressed the issue in the instant case. As a consequence, this Court should allow additional circuits to weigh in on this question and afford the Eleventh Circuit the opportunity to address the issue in light of the recent decisions of *Sossamon* (Fifth Circuit), *Cardinal* (Sixth), *Nelson* (Seventh), and *Van Wyhe* (Eighth). Given the fact that these decisions have been released in rapid succession, the Eleventh Circuit should be given an opportunity to revisit this issue in light of subsequent case law.

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[14] *Smith*, 502 F.3d 1255.

[15] *Smith*, 502 F.3d at 1270-1271 ("Congress expressed no intent to the contrary within RLUIPA, even though it could have, by, for example, explicitly limiting the remedies set forth in § 2000cc(a) to injunctive relief only.").

### B. The decision below of the Court of Appeals is correct.

Further review by this Court is not warranted because the ruling below is correct. The Eleventh Circuit's opinion in *Smith* cannot be squared with this Court's decisions.

The Court of Appeals properly recognized that, "[B]ecause RLUIPA's 'appropriate relief' language does not clearly and unequivocally indicate that the waiver extends to monetary damages, the Eleventh Amendment bars plaintiff's claim for monetary relief under RLUIPA."[16] Put another way, before a court will presume that States waived their sovereign immunity conditioned on the receipt of federal funds, the statutory language must be unmistakably clear.[17]

In *Lane v. Pena*, this Court indicated that "To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims."[18] Additionally, this Court held that there is no such thing as a constructive waiver. In fact, this Court indulges "[E]very reasonable presumption against waiver."[19]

Since RLUIPA's "appropriate relief" language is, at best uncertain, regarding what type of relief is available,

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[16] *Cardinal*, 564 F.3d at 801.

[17] *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291, 296 (2006); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

[18] *Lane v. Pena*, 518 U.S. 187, 192 (1996).

[19] *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 682 (1999).

no damage remedy should be presumed. As the Fifth Circuit noted in *Sossamon*, RLUIPA's "appropriate remedy" language is not sufficiently clear in light of this Court's sovereign immunity jurisprudence.[20]

Citing *Franklin v. Gwinnett County Public Schools*,[21] the Eleventh Circuit concluded, if Congress did not give any guidance or clear indication of its purpose with respect to remedies, federal courts should presume the availability of all appropriate remedies.[22] Similarly, in his petition Cardinal cites this Court's decision in *Barnes v. Gorman*,[23] to stand for the proposition that "[S]tates are on notice that by accepting federal prison funding, they are liable for compensatory damages and would be even if RLUIPA was completely silent as to available remedies." (Pet. App 13)

Contrary to Cardinal's position and the Eleventh Circuit's holding, *Franklin* and *Barnes* are inapposite because neither case involved a question of state sovereign immunity. Monetary relief might be appropriate against counties or municipalities because the Eleventh Amendment generally does not apply to them. Had the Eleventh Circuit used the proper analytical framework, it may well have reached a different conclusion. Consequently, the Eleventh Circuit's opinion is flawed.

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[20] *Sossamon*, 560 F.3d at 331.

[21] *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 68-69 (1992).

[22] *Smith*, 502 F.3d at 1270.

[23] *Barnes v. Gorman*, 536 U.S. 181 (2002).

Simply stated, this case does not present the "compelling reasons" required by Supreme Court Rule 10 to warrant the granting of certiorari.

## III. The Court of Appeals did not effectively invalidate an Act of Congress.

Cardinal argues that this Court should grant his petition because the Court of Appeals' decision effectively held a key provision of a civil rights law unconstitutional (Pet. App. 11). That assertion is wrong.

The Court of Appeals did not invalidate an Act of Congress. Nor did the Court of Appeals conclude that Congress could not condition the disbursement of federal funds on a waiver of immunity. Rather, employing principles of statutory construction, the Court of Appeals held that Congress had chosen not to exercise its authority to do so in this instance. Cardinal's attempt to inject a constitutional question into this case when there is none should be rejected.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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IN THE

# Supreme Court of the United States

GERALD WILLIAM CARDINAL,

*Petitioner*,

v.

LINDA METRISH,

*Respondent.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

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## REPLY BRIEF FOR THE PETITIONER

Respondent acknowledges that the decision in this case conflicts with the Eleventh Circuit's holding in *Smith v. Allen*, 502 F.3d 1255 (2007), that states are not immune to damages claims under RLUIPA. BIO 8. Respondent also does not contest that the issue is of recurring practical importance, given the frequency of RLUIPA litigation. Indeed, as the Brief in Opposition notes, the question has arisen in four courts of appeals in the past eight months alone. *See id.* Nor does respondent dispute the broader significance of the underlying constitutional principles at issue in this case.

Respondent nevertheless resists certiorari on the grounds that the circuit split is unripe for review, that the decision below did not effectively invalidate a provision of a congressional enactment, and that this case presents a poor vehicle for deciding the question presented. BIO 4-5. None of these objections is persuasive.

### I. There Is No Reason To Think That The Conflict In The Lower Courts Will Resolve Itself Without This Court's Intervention.

Contrary to respondent's speculations, the Eleventh Circuit has given no indication that it is likely to reconsider its holding in *Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007). When it decided *Smith*, the Eleventh Circuit was aware of the Fourth Circuit's contrary position, *see Smith*, 502 F.3d at 1270, but found its arguments unpersuasive. To reverse course now would require the circuit to reconsider that holding en banc. But the court denied rehearing en banc in *Smith* itself. *See* 277 Fed. Appx. 979 (11th Cir. 2008). And it subsequently reaffirmed

the Circuit's position in *Hathcock v. Cohen*, 287 Fed. Appx. 793, 798 n.6 (11th Cir. 2008).

Respondent notes that in the past few months additional circuits have weighed into the debate, siding with the Fourth Circuit and rejecting the view of the Eleventh. BIO 9. But there is no reason to believe that these decisions will cause the Eleventh Circuit to take up the issue en banc and change its position. The recent decisions have added no significant analyses of their own, but instead have simply pointed to the Fourth Circuit's reasoning in *Madison v. Virginia*, 474 F.3d 118 (4th Cir. 2006), and to other courts that have followed it. *See* Pet. App. 11a (adopting the rationale of the Fourth and Fifth Circuits); *Van Wyhe v. Reisch*, No. 08-1409, 2009 WL 2879980, at *9 (8th Cir. Sept. 10, 2009) ("We agree . . . with the analysis of the Fourth, Fifth, Sixth, and Seventh Circuits."); *Nelson v. Miller*, 570 F.3d 868, 884 (7th Cir. 2009) ("We find the Fourth and Fifth Circuits' analysis convincing."). Having already rejected those arguments in *Smith*, there is no reason for the Eleventh Circuit to reconsider its position now.

In fact, despite the recent contrary decisions of other circuits, the Eleventh Circuit last month affirmed an award of damages under RLUIPA to a prisoner in Florida. *See Linehan v. Crosby*, No. 08-15780, 2009 WL 3042038, at *1 (11th Cir. Sept. 24, 2009). As *Linehan* reflects, the availability of damages under RLUIPA is now so well-established in the Eleventh Circuit that the issue no longer warrants published opinions and states appear

unwilling to continue to contest it.[1] And, of course, if states within the Eleventh Circuit view the law as settled, the court of appeals will never have occasion to revisit its decision in *Smith*.

Respondent does not deny that the current division of authority is untenable. As it now stands, different remedies are available to identically situated inmates depending on geography. In *Linehan*, for example, the inmate made the same claim as petitioner here – both sought damages for denial of kosher food in violation of RLUIPA. *Compare* Pet. App. 2a *with Linehan*, 2009 WL 3042038, at *1. Yet because Linehan's case arose in the Eleventh Circuit instead of the Sixth, he received damages, while petitioner did not. If the Eleventh Circuit's view of the law is correct, thousands of inmates nationwide will continue to be denied remedies that Congress intended to provide them based on a mistaken construction of the Eleventh Amendment and this Court's decisions. At the same time, absent intervention by this Court, states within the Eleventh Circuit will continue to be subject to liability that other circuits have held forbidden by the

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[1] It appears that in *Linehan*, the State of Florida did not contest the availability of RLUIPA damages. *See* Supplemental Motion for Summary Judgment for Defendant Crosby at 3, *Linehan v. Crosby*, No. 05-00225-CV-4-MMP-WCS, 2008 WL 6892596 (N.D. Fla. Aug. 20, 2008); Supplemental Motion for Summary Judgment for Defendants McDonough et al. at 2, *Linehan v. Crosby*, No. 05-00225-CV-4-MMP-WCS, 2008 WL 6892596 (N.D. Fla. Aug. 20, 2008); Answer Brief of Appellee Crosby at vi, *Linehan v. Crosby*, No. 08-15780, 2009 WL 3042038 (11th Cir. Sept. 24, 2009); Answer Brief of Appellee McDonough et al. at ii, *Linehan v. Crosby*, No. 08-15780, 2009 WL 3042038 (11th Cir. Sept. 24, 2009).

Constitution. Either way, the continuing conflict is intolerable.

## II. Certiorari Is Warranted Because The Court Of Appeals Effectively Invalidated A Provision Of A Federal Statute.

Certiorari would be warranted even absent a circuit split because the decision below effectively invalidated a portion of RLUIPA's remedial scheme on constitutional grounds that only this Court can correct.

Respondent does not deny this Court's special responsibility to ensure that provisions of an Act of Congress are not invalidated by the lower federal courts based on a mistaken view of the Constitution. *See* Pet. 11-12. Instead, she insists that the decision in this case was based solely on "principles of statutory construction," through which "the Court of Appeals held that Congress had chosen not to exercise its authority" to condition receipt of federal funds on a waiver of immunity to suits for money damages. BIO 12. But the court of appeals expressly founded its decision on constitutional grounds, explaining that "the Eleventh Amendment bars plaintiff's claim for monetary relief under RLUIPA." Pet. App. 12a. Moreover, the Sixth Circuit did not dispute that absent Eleventh Amendment considerations, RLUIPA's reference to "appropriate relief" would encompass damages under this Court's decision in *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992). *See* Pet. App. 10a. The only reason the court of appeals gave for not giving RLUIPA that construction was because it concluded that doing so would violate the State's rights under the Eleventh Amendment. Pet. App. 10a-12a.

However that decision is characterized, it implicates this Court's important responsibility to ensure that Congress's legislative intent is not thwarted on the basis of an erroneous construction of the Constitution.

## III. This Case Presents An Ideal Vehicle To Resolve The Circuit Split.

Although respondent argues that this case presents a poor vehicle for resolving the circuit conflict, she does not deny that the Eleventh Amendment question is squarely presented by the facts of this case, which are typical of many prisoner RLUIPA claims. Nor does respondent contest that the question was preserved by petitioner, was thoroughly considered by the court of appeals, and was dispositive of petitioner's claim for damages below. *See* Pet. App. 5a-12a. Instead, respondent insists that petition presents a poor vehicle for deciding the question presented because, in her view, the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(e), independently precludes any meaningful remedy in this case. In particular, respondent argues that because petitioner did not allege a physical injury, Section 1997e(e) of the PLRA permits, at most, an award of nominal damages for the violation of his rights under RLUIPA. BIO 4. Both the premise and the conclusion of this argument are unsound.

The premise is unsound because Section 1997e(e) has no application to this case.[2] For one thing, respondent's assertion that petitioner "never alleged that he suffered a physical injury," BIO 4, is untrue. Petitioner's complaint alleged that for eight days respondent failed to provide him food that he could eat. Complaint ¶ 16. As a result, he alleged, he lost fifteen pounds, suffered "bad abdominal pain," and found his legs "trembl[ing] uncontrollably." Complaint ¶¶ 30-32. Respondent cites no authority for her apparent assumption that such consequences do not satisfy Section 1997e(e)'s "physical injury" requirement. And, in fact, there is authority to the contrary. *See Pratt v. Corr. Corp. of Am.*, 124 Fed. Appx. 465 (8th Cir. 2005) (finding weight loss resulting from lack of religiously acceptable food in violation of RLUIPA was a sufficient physical injury); *Mitchell v. Horn*, 318 F.3d 523 (3d Cir. 2003) (finding as little as four days without food, water, and sleep, might be sufficient and remanding for further fact finding).

In addition, even in the absence of physical injury, a suit alleging a denial of religious freedom in violation of RLUIPA is not an action for "mental or emotional injury" within the meaning of the Section 1997e(e). In *Canell v. Lightner*, 143 F.3d 1210 (9th Cir. 1998), the Ninth Circuit explained that a suit seeking compensation for the denial of religious freedom under the First Amendment is "not . . . a claim for 'mental or emotional injury'" within the

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[2] Respondent did not argue below that petitioner's claims were limited by Section 1997e(e), and neither the district court nor the court of appeals passed on that assertion.

meaning of the PLRA. *Id.* at 1213. As a result, the court held, Section 1997e(e) "does not apply to First Amendment Claims regardless of the form of relief sought." *Id.* In a subsequent case, the Sixth Circuit followed *Canell* in holding that a prisoner's First Amendment retaliation claim was not precluded by Section 1997e(e), even though the inmate alleged no physical injury arising from the retaliation. *See Williams v. Ollis*, Nos. 99-2168, 99-2234, 2000 WL 1434459, at *2 (6th Cir. Sept. 18, 2000); *see also, e.g.*, *Rowe v. Shake*, 196 F.3d 778, 781 (7th Cir. 1999) (stating "[a] deprivation of First Amendment rights standing alone is a cognizable injury").[3] To be sure, petitioner's RLUIPA claim arises under a statue enacted by Congress to vindicate the Constitution's promise of religious freedom, rather than directly under the Constitution itself. But under Section 1997e(e), "it is the nature of the relief sought, and not the underlying substantive violation, that controls." *Geiger v. Jowers*, 404 F.3d 371, 375 (5th Cir. 2005). And as several courts have previously recognized, just because a violation of religious freedom causes an intangible harm does not mean that the injury is properly characterized as "emotional" or "mental," as if the violation of a person's fundamental religious

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[3] Other circuits have held that Section 1997e(e) precludes compensatory, but not nominal or punitive damages. *See Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 327 n.5 (5th Cir. 2009); *Royal v. Kautzky*, 375 F.3d 720, 722-23 (8th Cir. 2004); *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002); *Searles v. Van Bebber*, 251 F.3d 869, 879-81 (10th Cir. 2001); *Allah v. Al-Hafeez*, 226 F.3d 247, 252 (3d Cir. 2000). The D.C. Circuit has held that punitive damages are precluded as well. *See Davis v. District of Columbia*, 158 F.3d 1342, 1348-49 (D.C. Cir. 1998).

beliefs amounted to nothing more than a case of hurt feelings.

Finally, even if nominal damages were the maximum compensation available, this case would still present an appropriate vehicle for resolving the circuit split. Respondent does not claim that the lack of a physical injury would moot petitioner's case or that a case arising in some other context would present the basic statutory and constitutional questions in any materially different light. The only thing denial of certiorari would ensure is the continued untenable disparity in treatment of similarly situated inmates and state institutions in different circuits.

## IV. The Sixth Circuit's Decision Was Wrong.

Review is also warranted because the Sixth Circuit's opinion was incorrect.

1. Respondent claims that the phrase "appropriate relief," read in isolation, is insufficiently clear to put states on notice that by accepting federal prison funding, they are subjecting themselves to suit for damages under RLUIPA. BIO 11. But as the petition explains, this Court has made clear that federal funding recipients are required to read statutory funding conditions in legal context, which includes the background legal understanding that when federal law authorizes a cause of action (which RLUIPA unambiguously does) all appropriate relief, including damages, is available to remedy a violation. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66-71 (1992). This is true even under a Spending Clause statute. *Id.* at 74-75 (rejecting argument that "the normal presumption in favor of all appropriate remedies should not apply because Title IX was

enacted pursuant to Congress's Spending Clause power").

Respondent complains that applying *Franklin*'s presumption to RLUIPA conflicts with the requirement that federal funding conditions be clear. BIO 10. But this Court resolved any tension between *Franklin* and the Court's clear notice requirements in *Barnes v. Gorman*, 536 U.S. 181 (2002), when it held that a "funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract," including "compensatory damages." *Id.* at 187.

Accordingly, at the time the State of Michigan received the relevant federal funds in this case, it was clear that even if RLUIPA did not mention remedies at all, recipients were on notice that accepting the funds would subject them to a damages remedy. By going further and providing an express cause of action for "appropriate relief" – the very phrase this Court used in *Franklin* to describe a Spending Clause remedy encompassing damages – Congress employed what is now a term of art with an established meaning that fully informed the State of the consequences of accepting federal funds. *Cf. Morissette v. United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning" it is presumed to "adopt[] the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken").

2. Respondent does not dispute that under *Franklin* and *Barnes*, non-state funding recipients are sufficiently on notice that by accepting federal funds

they subject themselves to damages liability under RLUIPA. *See* BIO 11. She nonetheless asserts that because neither *Franklin* nor *Barnes* "involved a question of state sovereign immunity," what is clear enough for a county-run prison or a municipal jail is not clear enough for a state prison. *Id.*[4] That is incorrect.

Respondent's argument is premised on the undefended presumption that the clarity required by the Eleventh Amendment is greater than that required by the Spending Clause. Petitioner cites no authority for this proposition. And, in fact, it is difficult to imagine a stricter clear statement rule than the one already applied under the Spending Clause to *all* federal funding conditions – the Court has repeatedly held that because "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the 'contract.' . . . if Congress intends to impose a condition on the grant

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[4] States commonly transfer inmates between state, county, and municipal correctional facilities. *See, e.g.*, N.C. GEN. STAT. § 162-39(b) (2008) ("[W]henever prisoners are arrested in such numbers that county jail facilities are insufficient and inadequate for the safekeeping of such prisoners, the resident judge of the superior court . . . may order the prisoner transferred to a unit of the State Department of Correction designated by the Secretary of Correction."); OHIO REV. CODE ANN. § 341.21(A) (2009) ("The board of county commissioners may direct the sheriff to receive into custody prisoners charged with or convicted of crime by the United States, and to keep those prisoners until discharged."); TENN. CODE ANN. § 41-4-121(a) (2009) ("The sheriff has authority, when the jail of the county is insufficient for the safekeeping of a prisoner, to convey the prisoner to the nearest sufficient jail in the state.").

of federal moneys, it must do so *unambiguously*." *Barnes*, 536 U.S. at 186 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)) (emphasis added). The Court's sovereign immunity decisions, in turn, likewise require that a government's "waiver of sovereign immunity must extend *unambiguously* to . . . monetary claims." *Lane v. Pena*, 518 U.S. 187, 192 (1996) (emphasis added).

As a result, respondent cannot credibly claim that the Court's conclusion in *Barnes* – that a city is unambiguously on notice that accepting federal funds subjects it to damages under a federal civil rights statute – has no application to state recipients. And, in fact, lower courts have repeatedly applied the damages remedy recognized in *Franklin* and *Barnes* to all federal funding recipients, including state institutions. *See, e.g., Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1174 (10th Cir. 2007); *Williams v. Bd. Of Regents*, 477 F.3d 1282, 1293 (11th Cir. 2007); *Stanley v. Trs. of the Cal. State Univ.*, 433 F.3d 1129, 1133 (9th Cir. 2006); *Lovell v. Chandler*, 303 F.3d 1039, 1056-57 (9th Cir. 2002); *Horner v. Ky. High Sch. Ath. Ass'n*, 206 F.3d 685, 690 (6th Cir. 2000).

As these cases recognize, and *Barnes* and *Franklin* illustrate, Congress can unambiguously condition federal funds on submission to a damages remedy without having to use the word "damages" in the text of the statute. States no less than any other contracting party are expected to read the terms of a funding agreement in light of background legal principles and to understand that terms of art with an established meaning in the law, such as "appropriate relief," must be given their ordinary interpretation. The Eleventh Amendment entitles

states to sufficient notice of the consequences of accepting funds to enable them to make an informed judgment in deciding whether to accept the funding. It does not dictate to Congress the words that it must use to provide states that notice.

## CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, the petition for a writ of certiorari should be granted or held pending disposition of *Sossamon v. Texas*, No. 08-1438.

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No. 09-109

# In the Supreme Court of the United States

GERALD WILLIAM CARDINAL, PETITIONER

*v.*

LINDA METRISH, WARDEN

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTION PRESENTED

Whether an individual may sue a State or a state official in her official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

This brief is submitted in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

## STATEMENT

1. Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, to provide statutory protection against religious discrimination, unequal treatment of religions in the provision of accommodations, and unjustified infringement of the free exercise of religion. The statute applies to two specific contexts, land use regulation and institutionalization. The provision at issue in this case is Section 3 of RLUIPA, 42 U.S.C. 2000cc-1, which provides that "[n]o government shall impose a

substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden "is in furtherance of a compelling governmental interest," and "is the least restrictive means" of furthering that interest. 42 U.S.C. 2000cc-1(a)(1) and (2). Congress defined the statutory term "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A). And Congress defined "government" as "a State, county, municipality, or other governmental entity created under the authority of a State"; "any branch, department, agency, instrumentality, or official of [such] an entity"; and "any other person acting under color of State law." 42 U.S.C. 2000cc-5(4)(A).

Before enacting RLUIPA, Congress held nine hearings over three years, gathering substantial evidence that, in the absence of federal legislation, persons institutionalized in state mental hospitals, nursing homes, group homes, prisons, and detention facilities had faced substantial, unwarranted, and discriminatory burdens on their religious exercise. See, *e.g.*, H.R. Rep. No. 219, 106th Cong., 1st Sess. 5, 9 (1999) (*House Report*); *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. 16,698-16,699 (2000). Such "frivolous or arbitrary barriers" to religious exercise, *Cutter* v. *Wilkinson*, 544 U.S. 709, 716 (2005) (citation and internal quotation marks omitted), affected persons confined to correctional facilities in particular. See *House Report* 9-10; 146 Cong. Rec. at 16,701. Congress heard testimony about sectarian discrimination in the accommodations afforded to prisoners, see *Protecting Religious Freedom After* Boerne *v.* Flores: *Hearing Before the Subcomm. on the Constitution of the House*

*Comm. on the Judiciary*, 105th Cong., 2d Sess. Pt. 3, at 41 (1998) (statement of Isaac Jaroslawicz), as well as instances of prison officials' interfering with religious rituals without apparent justification, 146 Cong. Rec. at 16,699, 16,701.

Based on the evidence it collected, Congress concluded that prison inmates faced "frivolous or arbitrary" rules that resulted from "indifference, ignorance, bigotry, or lack of resources" and that had the effect of restricting their religious exercise "in egregious and unnecessary ways." 146 Cong. Rec. at 16,699. To prevent federal funds from contributing to such unreasoned or discriminatory burdens on the religious exercise of institutionalized persons, Congress invoked its Spending Clause authority, U.S. Const. Art. I, § 8, Cl. 18, to apply RLUIPA's statutory protections whenever a substantial burden on religious exercise "is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. 2000cc-1(b)(1).[1] A covered "program or activity" includes "all of the operations of * * * a department, agency, special purpose district, or other instrumentality of a State or of a local government." 42 U.S.C. 2000cc-5(6), 2000d-4a.

To ensure that persons entitled to RLUIPA's protection may vindicate their rights, Congress created a private right of action, permitting any individual whose religious exercise has been substantially burdened in a manner prohibited by the statute to "assert a violation

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[1] In a provision not at issue in this case, Congress also invoked its authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, in providing that RLUIPA's protections apply to institutionalized persons when "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States or with Indian tribes." 42 U.S.C. 2000cc-1(b).

of this chapter as a claim or defense in a judicial proceeding" and to obtain "appropriate relief against a government." 42 U.S.C. 2000cc-2(a). In addition, the United States may seek injunctive or declaratory relief to enforce the statute. 42 U.S.C. 2000cc-2(f).

2. Petitioner was confined at the Hiawatha Correctional Facility (Hiawatha) of the Michigan Department of Corrections, where he participated in the facility's kosher meals program. Pet. App. 1a-2a, 20a. After several incidents of misconduct, petitioner was placed in temporary segregation. Because Hiawatha could not house inmates in temporary segregation for longer than eight hours, he was soon transferred to the Kinross Correctional Facility (Kinross). *Id.* at 2a. Kinross does not offer kosher meals and petitioner refused to eat the non-kosher meals provided. *Ibid.* Seventy-two hours elapsed before the staff at Kinross contacted its Health Services department about petitioner's situation; another two days passed before the warden at Kinross was notified that petitioner was refusing to eat the non-kosher meals; on the following day (petitioner's sixth at Kinross), petitioner was transferred to a third facility that both provides kosher meals and houses inmates in temporary segregation; and two more days elapsed before petitioner had access to a kosher meal at the new facility. *Id.* at 2a & n.1. Thus, petitioner was denied food that he could eat consistent with his religious beliefs for approximately 192 hours—a total of eight days. *Ibid.*

3. Petitioner filed a pro se complaint against respondent (the warden of Kinross) in her official capacity for violations of RLUIPA, seeking equitable relief and dam-

ages under the statute. Pet. App. 2a, 20a-21a.[2] Adopting the magistrate judge's report and recommendation (see *id.* at 28a-33a), the district court granted the respondent's motion for summary judgment. *Id.* at 3a, 19a-27a. The court acknowledged that the plain language of RLUIPA creates a cause of action against the State, and that the State waived its Eleventh Amendment immunity to suit for some form of relief by accepting federal funds. *Id.* at 23a. But the court held that RLUIPA's authorization of "appropriate relief" was not sufficiently clear to put States on notice that the acceptance of federal funds would subject them to money damages. *Id.* at 23a-25a.[3]

4. The court of appeals affirmed. Pet. App. 1a-15a. Addressing petitioner's claim for money damages under RLUIPA, the court considered whether such damages are encompassed in the "appropriate relief" authorized by 42 U.S.C. 2000cc-2(a), Pet. App. 6a-12a, an issue over which the circuit courts were and are divided, *id.* at 6a-7a. The court noted that the Eleventh Circuit had held that RLUIPA's authorization of "appropriate relief" against a government defendant authorizes private damages suits against States that accept federal funds, *Smith* v. *Allen*, 502 F.3d 1255, 1271 (2007), while the Fourth and Fifth Circuits had held the opposite, *Madison* v. *Virginia*, 474 F.3d 118, 122-123 (4th Cir. 2006); *Sossamon* v. *Lone Star State of Tex.*, 560 F.3d

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[2] Petitioner's complaint also included a claim pursuant to 42 U.S.C. 1983 against respondent in her individual capacity for violations of the Eighth Amendment. Pet. App. 2a, 19a-20a.

[3] The district court also held that petitioner's claim for equitable relief was rendered moot by his transfer to a facility that provided kosher meals, Pet. App. 25a, and the court of appeals affirmed that holding, *id.* at 5a-6a.

316, 329-331 (5th Cir. 2009), petition for cert. pending, No. 08-1438 (filed May 8, 2009). Pet. App. 7a-10a. The court agreed with the Fourth and Fifth Circuits, holding that "RLUIPA does not contain a clear indication that Congress unambiguously conditioned receipt of federal prison funds on a State's consent to suit for monetary damages." *Id.* at 11a. Thus, the court concluded that "the Eleventh Amendment bars [petitioner's] claim for monetary relief under RLUIPA." *Id.* at 11a-12a.[4]

5. On November 2, 2009, this Court invited the Solicitor General to file a brief expressing the views of the United States on whether the Court should grant the petition for a writ of certiorari in this case and another case (*Sossamon* v. *Texas*, No. 08-1438 (filed May 18, 2009)). *Sossamon* presents the same question that petitioner raises in this case, as well as an additional question not presented here.[5]

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[4] Judge Clay concurred in part and dissented in part, Pet. App. 15a-18a. He would not have reached the question whether "the doctrine of sovereign immunity bars a plaintiff from recovering monetary damages under" RLUIPA. *Id.* at 15a-16a.

[5] For the reasons stated in the United States' amicus brief filed in *Sossamon*, *supra*, the petition for a writ of certiorari in *Sossamon* should be held pending this Court's disposition of the petition in this case. The instant case is a more appropriate vehicle for resolution of the question whether money damages are available against a State for violations of RLUIPA's protection of inmates' religious exercise. First, the additional question raised in *Sossamon* (whether RLUIPA creates a damages remedy against state officials in their individual capacities) is not the subject of a circuit split and does not otherwise warrant this Court's review. Second, the plaintiff in *Sossamon* may not be entitled to anything other than nominal damages in any case because he does not appear to allege a physical injury.

## DISCUSSION

The court of appeals in this case erred in concluding that the Eleventh Amendment bars private parties from recovering monetary damages in suits seeking to enforce RLUIPA's institutionalized persons provisions. The courts of appeals are divided over the proper resolution of the question presented in this case, and there is no indication that the split in authority will resolve itself. On the contrary, because the division rests primarily on differing interpretations of this Court's precedents, it is necessary and appropriate for this Court to step in. This Court should grant the petition for a writ of certiorari to resolve the division among the courts of appeals and to correct the reasoning of the court of appeals in this case and in four other circuits.

### A. The Court Of Appeals Incorrectly Concluded That A State That Accepts Federal Funds Does Not Waive Its Eleventh Amendment Immunity To Suits For Money Damages Under RLUIPA

This Court has made clear that Congress, in the exercise of its power under the Spending Clause, may condition the receipt of federal funds on a State's waiver of Eleventh Amendment immunity to suit—including suits seeking money damages. See *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 686-687 (1999); *Lane* v. *Pena*, 518 U.S. 187, 198-200 (1996). When Congress intends to attach such a condition to the receipt of federal funds, it must do so clearly and unambiguously. See, *e.g.*, *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 247 (1985) (*Atascadero*); *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987). Congress has done exactly that in two separate statutory provisions, thereby putting States on notice that, if they accept fed-

eral funds for their correctional systems, they will be subject to private suits in federal court to enforce RLUIPA's protection of inmates' religious liberties, including suits for money damages. By accepting such funds, a State knowingly waives its Eleventh Amendment immunity to RLUIPA claims brought by state inmates.

*1. In 42 U.S.C. 2000d-7, Congress clearly conditioned a State's receipt of federal funds on its waiver of Eleventh Amendment immunity to damages suits to enforce various federal statutes, including RLUIPA*

The court of appeals held (Pet. App. 6a) that Congress's authorization in RLUIPA of private suits seeking "appropriate relief" against States that accept federal funds is sufficient to put States on notice that, by accepting such funds, they consent to private suits in federal court seeking injunctive relief. The court also held (*id.* at 6a-12a), however, that RLUIPA's authorization of appropriate relief is insufficiently clear to effect a waiver of immunity to damages claims under RLUIPA. But the court did not need to reach that question because Congress explicitly conditioned the receipt of federal funds on a State's waiver of its Eleventh Amendment immunity to suits seeking both types of relief when Congress enacted a statutory provision titled "Civil rights remedies equalization" in 1986. Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100

Stat. 1845 (42 U.S.C. 2000d-7).[6] That provision provides in pertinent part:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], *or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.*

42 U.S.C. 2000d-7(a)(1) (brackets in original) (emphasis added). Section 2000d-7(a)(2) further specifies that a plaintiff may recover "remedies both at law and in equity" against a State for a suit brought under Section 2000d-7(a)(1).

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[6] It appears that the court of appeals did not consider whether Section 2000d-7 applies to RLUIPA claims. See Pet. App. 5a-12a; see also *id.* at 16a-17a (noting that petitioner filed his brief pro se and that respondent did not file a brief at all in the court of appeals). This Court would nevertheless be free to consider whether Section 2000d-7's requirement that federal fund recipients waive their Eleventh Amendment immunity applies to RLUIPA claims under the Court's "traditional rule" that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 375, 379 (1995) (brackets in original). The argument that a State waives its immunity pursuant to Section 2000d-7 is "not a new claim within the meaning of that rule, but a new argument to support what has been [petitioner's] consistent claim:" that he is entitled to sue respondent in her official capacity for money damages under RLUIPA. *Ibid.*

Section 2000d-7 was enacted in response to this Court's decision in *Atascadero*, 473 U.S. at 246, which held that Congress had not used sufficiently clear statutory language in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504), to condition the receipt of federal financial assistance on a State's waiver of its Eleventh Amendment immunity to claims brought under that section. The Court reaffirmed in *Atascadero* that "mere receipt of federal funds" by a State is insufficient to constitute a waiver of immunity, while confirming that, if a statute "manifest[s] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity," the acceptance of funds constitutes a waiver. 473 U.S. at 246-247; *College Sav. Bank*, 527 U.S. at 686.

Section 2000d-7 provides the unequivocal notice demanded by this Court's precedents to "enable the States to exercise their choice [to accept federal funds] knowingly, cognizant of the consequences of their participation" in a federal spending program. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981) (*Pennhurst*). Section 2000d-7 makes clear that a State or state agency that accepts federal funds will be subject to private suits (including suits for money damages) in federal court to enforce "any * * * Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. 2000d-7(a)(1). See *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 78 (1992) (Scalia, J., concurring) (explaining that Section 2000d-7 "must be read * * * as an implicit acknowledgment that damages are available" in suits against States). RLUIPA is such a statute.

Although the court of appeals did not consider the applicability of Section 2000d-7 to this case, some courts

of appeals have held (and respondent argues, Resp. Br. at 6-8, in *Sossamon* v. *Texas*, *supra* (No. 08-1438)) that Section 2000d-7's catch-all provision does not waive immunity from a suit like petitioner's because the relevant statutory protection in RLUIPA does not use the word "discrimination." *Madison* v. *Virginia*, 474 F.3d 118, 132-133 (4th Cir. 2000); *Van Wyhe* v. *Reisch*, 581 F.3d 639, 654-655 (8th Cir. 2009), petition for cert. pending, No. 09-821 (filed Jan. 8, 2010). But that argument inappropriately narrows the meaning of the word "discrimination" as used in Section 2000d-7. This Court has already held that the word "'[d]iscrimination' is a term that covers a wide range of intentional unequal treatment," and that, "by using such a broad term, Congress g[i]ve[s] the statute a broad reach." *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). So too in Section 2000d-7: when Congress clearly conditioned federal funds on a State's waiver of Eleventh Amendment immunity to claims under "any" federal statute "prohibiting discrimination by recipients of Federal financial assistance," 42 U.S.C. 2000d-7(a), it thereby included statutes prohibiting a broad range of discriminatory conduct.

That broad range of conduct may include a failure to make reasonable accommodations as prescribed by law. Section 504 of the Rehabilitation Act—the very statute at issue in *Atascadero* and listed first in Section 2000d-7—demonstrates how a prohibition on "discrimination" may include an affirmative accommodation requirement such as that in RLUIPA. For decades, regulations have interpreted Section 504's ban on disability-based discrimination to require that covered entities make "reasonable accommodation[s]" for qualified per-

sons with disabilities. See, *e.g.*, 28 C.F.R. 41.53.[7] And Section 504's affirmative accom-modation obligation is similar to requirements in other statutes, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* In Title VII, Congress explicitly stated that its prohibition of discrimination on the basis of religion includes a requirement that employers provide reasonable religious accommodations to employees' religious observance and practice. See 42 U.S.C. 2000e-2(a), 2000e(j). Similarly, Congress's reference in Section 2000d-7 to statutes prohibiting "discrimination" should be understood to include RLUIPA's requirement of such accommodations in the prison setting.

Indeed, the potential linkage between a failure to make a reasonable religious accommodation and a prototypical act of animus-based discrimination is evident in the complaint petitioner filed in this case. See Pl.'s Amended Compl., 2:06-cv-232 Docket entry No. 20 para. 20 (W.D. Mich. Feb. 8, 2007) (Amended Complaint) (alleging that prison staff laughed at petitioner and asked, "How does it feel Kosher boy?" in response to his

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[7] This Court has similarly interpreted the term "discrimination" broadly in other statutes specifically enumerated in Section 2000d-7. For example, the Court has repeatedly interpreted the general prohibition of sex discrimination in Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 1681, to include more than a simple ban on traditional disparate treatment. Rather, the Court has interpreted the prohibited "discrimination" to include a school's deliberate indifference to teacher-on-student or student-on-student sexual harassment, see *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 649-651 (1999); *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287-290 (1998); *Franklin*, 503 U.S. at 74-75, as well as retaliation for complaining about sex discrimination, *Jackson*, 544 U.S. at 174; accord *Gomez-Perez* v. *Potter*, 128 S. Ct. 1931, 1936 (2008); *CBOCS W., Inc.* v. *Humphries*, 128 S. Ct. 1951, 1960-1962 (2008).

requests for any bit of food he could eat).[8] That linkage confirms that RLUIPA "follows in the footsteps of a long-standing tradition of federal legislation that seeks to eradicate discrimination and is 'designed to guard against unfair bias and infringement on fundamental freedoms.'" *Charles* v. *Verhagen*, 348 F.3d 601, 607 (7th Cir. 2003) (quoting *Mayweather* v. *Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002), cert. denied, 540 U.S. 815 (2003)); see *Saints Constantine & Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005) (Posner, J.).

Because RLUIPA is a "[f]ederal statute prohibiting discrimination by recipients of Federal financial assistance," the State of Michigan was put on notice by the plain language of Section 2000d-7 that its acceptance of federal funds for its correctional system would constitute a waiver of its Eleventh Amendment immunity to RLUIPA claims, including claims for money damages. That is a sufficient basis on which to sustain petitioner's RLUIPA claim against respondent, and the court of appeals erred in affirming the dismissal of that claim without regard to Section 2000d-7.

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[8] Moreover, RLUIPA includes an explicit prohibition on discrimination on the basis of religion by any government entity in the implementation of a land use regulation. 42 U.S.C. 2000cc(b). The close proximity of this explicit prohibition to the accommodation requirement specified for institutional settings demonstrates that Congress saw the two as of a piece—both meant to cure the inequitable treatment of religious persons by government officials.

*2. In the text of RLUIPA itself, Congress also clearly conditioned the receipt of federal funds on a State's waiver of its immunity to private damages actions in federal court to enforce the statute*

Independent of Section 2000d-7, Congress stated in RLUIPA itself that private individuals "may assert a violation" of RLUIPA "as a claim or defense in a judicial proceeding and obtain appropriate relief against a government," 42 U.S.C. 2000cc-2(a), including "a State," 42 U.S.C. 2000cc-5(4)(A)(i). The courts of appeals apparently agree that this provision places a State on notice that, when it accepts federal funds for its correctional system, it waives its Eleventh Amendment immunity to RLUIPA claims for declaratory and injunctive relief. *Van Wyhe*, 581 F.3d at 653-655; *Nelson* v. *Miller*, 570 F.3d 868, 884-885 (7th Cir. 2009); *Sossamon*, 560 F.3d at 331; *Madison*, 474 F.3d at 130-131; *Benning* v. *Georgia*, 391 F.3d 1299, 1305-1306 (11th Cir. 2004); Pet. App. 6a-12a. The courts of appeals disagree, however, about whether the authorization of "appropriate relief" is sufficient to put States on notice that they will be subject to suits for money damages.

This Court has frequently considered the scope of relief available to private individuals in suits brought to enforce civil rights laws enacted pursuant to the Spending Clause, specifically Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. 2000d *et seq.*, Title IX, and Section 504. Each of those statutes is enforceable by individuals through a private right of action, see *Barnes* v. *Gorman*, 536 U.S. 181, 185-186 (2002), but that right of action is implied, so nothing in the statutory text specifies what remedies are available. In lieu of that provision, this Court has held that those statutes permit individual litigants to seek "appropriate relief,"

and that "appropriate relief" includes compensatory money damages. See *id.* at 186-189; *Franklin*, 503 U.S. at 68-71.

Although determining the remedies available under RLUIPA involves interpreting the statutory phrase "appropriate relief" rather than specifying an aspect of an implied private right of action, the reasoning this Court employed in cases such as *Barnes* and *Franklin* dictates the same result. In *Franklin*, the Court confronted the question whether money damages are available in private suits under Title IX. In answering that question affirmatively, the Court explained that, when a statute creates a legal right and permits an individual to sue for invasion of that right, the Court "presume[s] the availability of *all appropriate remedies* unless Congress has expressly indicated otherwise." 503 U.S. at 66 (emphasis added); see *id.* at 68; *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). Specifically rejecting the contention that remedies under Title IX should be limited to injunctions and other equitable remedies, the Court further noted that "it is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief." *Franklin*, 503 U.S. at 75-76.

Particularly relevant to the issue presented here, the Court in *Franklin* eschewed a rule "that the normal presumption in favor of all appropriate remedies should not apply" to statutes "enacted pursuant to Congress' Spending Clause power." 503 U.S. at 74. Instead, the Court held that the availability of money damages for intentional violations of Spending Clause legislation is presumed so long as Congress clearly alerts fund recipients about the substantive requirements of the statute. *Id.* at 74-75.

The Court reaffirmed that rule in *Barnes*, holding that compensatory damages are available for violations of Section 504, although punitive damages are not. The Court explained that Spending Clause legislation is "much in the nature of a *contract*: in return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Barnes*, 536 U.S. at 186 (brackets in original) (quoting *Pennhurst*, 451 U.S. at 17). Although not all contract rules apply to Spending Clause legislation, this Court explained that the contract "analogy applies * * * in determining the *scope* of damages remedies." *Id.* at 187. Thus, a remedy for a violation of Spending Clause legislation "is 'appropriate relief' only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Ibid.* (quoting *Franklin*, 503 U.S. at 73) (internal citation omitted). That principle determined the appropriate scope of relief in a suit against a government entity for violating a funding condition: the fund recipient "is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract," including compensatory (but not punitive) money damages. *Ibid.*

If, instead of specifying that "appropriate relief" is available to private plaintiffs under RLUIPA, Congress had been altogether silent about the available scope of relief, this Court's holdings in *Franklin* and *Barnes* would fill the gap by specifying that compensatory damages are available. The result should be no different just because Congress in RLUIPA included an additional layer of clarity, specifically noting the availability of "appropriate relief." That is particularly true in light of Congress's adoption of the precise phrase this Court

used in *Franklin* and *Barnes* to describe the scope of relief (including money damages) that is generally available in a private suit against a party for violating a condition of federal funding.[9]

Respondent argues (Resp. Br. 11) that the rules articulated in *Franklin* and *Barnes* do not apply to RLUIPA because neither case involved a defendant entitled to Eleventh Amendment immunity. But the requirement that conditions attached to federal funds be unambiguously expressed does not vary according to the type of entity accepting the conditioned funds. That notice requirement, which formed the basis of the decisions in *Franklin* and *Barnes*, applies regardless whether Congress offers financial assistance to States, to local governments, or to private entities. *E.g.*, *Gebser*, 524 U.S. at 287 (noting necessity of "ensuring that 'the receiving entity of the federal funds [has] notice that it will be liable for a monetary award") (brackets in original) (quoting *Franklin*, 503 U.S. at 74). If other entities have sufficient notice of the availability of money damages in suits to enforce funding conditions, so too do States. To be sure, States and state agencies receiving federal funds start out with Eleventh Amendment immunity—to suits for injunctive relief as well as damages—while other entities do not. But that difference relates only to the situation that would exist *in the absence of* any clear condition in a federal spending statute

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[9] Congress's intention to provide private claimants with the ability to seek money damages is also apparent from the statute's express limitation on remedies the Attorney General may seek in enforcing RLUIPA. That limitation of remedy to "injunctive or declaratory relief," 42 U.S.C. 2000cc-2(f), would be utterly superfluous if plaintiffs in the private action established by the statute could not receive other remedies.

regarding private suits for money damages. The prospect of Eleventh Amendment immunity in that circumstance does not make a State any less able than another party to understand that a federal spending statute in fact includes such a clear condition.

In holding that a different standard applies in suits against States than in suits against other parties, the courts of appeals have ventured outside the Spending Clause context and relied instead on this Court's cases involving the federal government's waiver of *its own* sovereign immunity. *E.g.*, Pet. App. 10a-12a; *Madison*, 474 F.3d at 131-132; *Van Wyhe*, 581 F.3d at 653. In *Lane* v. *Pena*, *supra*, for example, the Court concluded that the holding in *Franklin* that the "implied private right of action under Title IX * * * supports a claim for monetary damages" does not apply to suits against the federal government. Instead, when a statute authorizes suit against the federal government, "the available remedies are not those that are 'appropriate,' but only those for which sovereign immunity has been expressly waived." 518 U.S. at 196-197.

But the federal government's voluntary waiver of its sovereign immunity is not akin to a State's waiver of Eleventh Amendment immunity in exchange for clearly conditioned federal funds. In the former case, the enactment of federal legislation itself constitutes the waiver, and the Court requires Congress to speak clearly in that legislation about both the Government's amenability to

suit and the relief available in such a suit.[10] But when Congress conditions the receipt of federal funds on a State's waiver of immunity, the waiver comes not from the terms of the legislation, but from the State's acceptance of funds with knowledge of the consequences. Here, a State has such knowledge because this Court has made clear that, when Congress attaches substantive conditions to the receipt of federal funds and (explicitly or implicitly) authorizes private parties to sue for violation of those conditions, those parties may seek money damages. Thus, when a State accepts federal funds for its correctional system, it does so cognizant of the following consequences: that it must comply with the substantive requirements of RLUIPA; that state inmates may sue for breach of those requirements; and that, if such an inmate prevails on the merits, the State will be liable for compensatory damages (unless otherwise prohibited, see pp. 21-22, *infra*).

### B. The Courts Of Appeals Are Divided On The Question Presented

The Court should grant the petition for a writ of certiorari not only to correct the court of appeals' erroneous holding, but also to resolve the division of authority among the courts of appeals.

To date, five courts of appeals (including the court of appeals in this case) have issued published decisions holding that money damages are not available against

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[10] Thus, for example, in *Webman* v. *Federal Bureau of Prisons*, 441 F.3d 1022 (2006), the District of Columbia Circuit correctly held that the term "appropriate relief" as used in the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*—which applies only to the federal government—is insufficient to waive the federal government's sovereign immunity from suits for monetary damages.

States for violations of RLUIPA. One has held the opposite.

The first court of appeals to consider the question presented was the Fourth Circuit, which held in *Madison*, 474 F.3d at 129-133, that RLUIPA's failure to explicitly authorize money damages precluded individuals from recovering such relief against States. The Fourth Circuit also held in *Madison* that Section 2000d-7 does not condition the receipt of federal funds on a State's waiver of immunity to a suit brought under RLUIPA because RLUIPA is not clearly a statute "prohibiting discrimination." *Id.* at 133.

Soon after *Madison*, the Eleventh Circuit reached the opposite conclusion, holding that RLUIPA's authorization of "appropriate relief" is sufficient to authorize suits for monetary damages against States and state officials acting in their official capacities. *Smith* v. *Allen*, 502 F.3d 1255, 1271 (2007). The Eleventh Circuit's decision in *Smith* followed its previous decision in *Benning* v. *Georgia*, 391 F.3d 1299, 1305 (2004), which held that "Congress unambiguously required states to waive their sovereign immunity from suits" under Section 3 of RLUIPA, but which did not address the types of relief available to private plaintiffs. *Id.* at 1306. Relying on this Court's decision in *Franklin*, 503 U.S. at 68-69, the Eleventh Circuit in *Smith* explained that, when Congress does not specify what remedies are available, courts should presume the availability of all appropriate remedies. 502 F.3d at 1270-1271. Assuming that Congress was aware of this Court's holding in *Franklin* and noting that Congress did nothing to limit the remedies set forth in 42 U.S.C. 2000cc(a), the court held that RLUIPA's reference to "all appropriate relief" encompasses money damages. *Smith*, 502 F.3d at 1270-1271.

Since the Eleventh Circuit's decision in *Smith*, four other courts of appeals have joined the Fourth Circuit in holding that money damages are not available to States in suits such as petitioner's. *Sossamon*, 560 F.3d at 330; Pet. App. 5a-12a; *Nelson*, 570 F.3d at 884; *Van Wyhe*, 581 F.3d at 653.[11]

The division in authority on the question presented is ripe for resolution by this Court. Contrary to respondent's suggestion (Resp. Br. 9), there is little reason to expect that the Eleventh Circuit will "revisit" this question "in light of subsequent case law" generated from other courts of appeals. When the Eleventh Circuit decided *Smith*, it acknowledged the Fourth Circuit's contrary decision in *Madison*, see *Smith*, 502 F.3d at 1270. The Eleventh Circuit subsequently denied rehearing en banc in *Smith*, see 277 Fed. Appx. 979 (2008), and has continued to adhere to its position despite additional courts of appeals' agreeing with the Fourth Circuit in *Madison*. See, *e.g.*, *Hathcock* v. *Cohen*, 287 Fed. Appx. 793, 798 n.6 (11th Cir. 2008).[12] The conflicting courts of appeals' decisions are based on divergent interpretations of this Court's precedents, and only this Court's intervention will resolve the dispute.

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[11] In addition, shortly after the Eleventh Circuit's decision in *Smith*, the Third Circuit held, in an unpublished opinion devoid of analysis on the issue, that the Eleventh Amendment barred a prisoner's RLUIPA claim against a prison warden in his official capacity. *Scott* v. *Beard*, 252 Fed. Appx. 491, 492-493 (2007).

[12] The courts of appeals that have considered the question in this case since the decisions in *Smith* and *Madison* have done little more than adopt *Madison*'s reasoning as their own. *Van Wyhe*, 581 F.3d at 654; *Nelson*, 570 F.3d at 884; *Sossamon*, 560 F.3d at 330-331; Pet. App. 6a-12a.

### C. This Case Presents An Appropriate Vehicle For Resolution Of The Question Presented

Contrary to respondent's contention (Resp. Br. 6-8), the instant case is an appropriate vehicle for this Court's resolution of the question presented. Respondent is correct that the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e(e), often poses an independent bar to recovery of money damages by state inmates under RLUIPA because the PLRA prevents an inmate from recovering more than nominal damages for a mental or emotional injury unless he can demonstrate a physical injury as well. 42 U.S.C. 1997e(e), 2000cc-2(e). But even assuming that imposing a substantial burden on an individual's religious exercise in violation of RLUIPA qualifies as a mental or emotional injury—which petitioner does not concede (see Pet. Reply Br. 6-8)—petitioner here does allege a physical injury. Petitioner alleges that he was deprived of food that he was able to eat for eight days, as a consequence of which he lost 15 pounds, and suffered "bad abdominal pain," "dizziness," "headaches," and uncontrollable trembling of his legs. Amended Complaint paras. 30-32. Thus, this case is a more suitable vehicle for resolution of the question presented than most cases in which the issue will arise. See *Mitchell* v. *Horn*, 318 F.3d 523, 534 (3d Cir. 2003); *Pratt* v. *Corrections Corp. of Am.*, 124 Fed. Appx. 465, 467 (8th Cir. 2005).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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